CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1936

No. 530

ROBERT PAGE WRIGHT, BANKRUPT,
PETITIONER,

vs.

VINTON BRANCH OF THE MOUNTAIN TRUST BANK OF ROANOKE, VIRGINIA, AND A. C. HARRIS, TRUSTEE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

[illegible]

[illegible]

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[fol. 1] [Caption omitted]

IN UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF VIRGINIA

No. 3922

In the Matter of Robert Page Wright, Debtor

Petition for Composition or Extension of Time to Pay Debts, etc., Pursuant to Provisions of the Bankruptcy Act—Filed March 29, 1935

To the Honorable John Paul, Judge of the District Court of the United States for the Western District of Virginia:

Your petitioner, Robert Page Wright, fifty-two years of age, who is a resident of the County of Bedford, in the Western District of the State of Virginia, residing on his [fol. 2] farm, situate about one-half mile from the village known as Old Stewartsville, represents to Your Honor as follows:

That he is a farmer, operating and owning, subject to liens, a tract of land containing about fifty-nine acres in one body of land; that he is unable to meet his debts as they mature; that his said real estate would under normal economic conditions be worth substantially more than the amount of his obligations, but that said property, under the existing conditions, would probably bring substantially less than his obligations, and that, in this sense, petitioner represents that he is insolvent, or unable to meet his debts as they mature, and that it is desirable to effect a composition or an extension of time to pay his debts.

Petitioner further represents that he is fifty-two years of age, that he is married, that his wife, Girtie F. Wright, resides with him in the Mansion House on said farm; that petitioner and his said wife have four children, three of whom are above the age of twenty-one years. Two of said children reside with petitioner, who for three years has been incapacitated for active work by reason of invalidism—heart affection.

That petitioner files herewith certain schedules containing a full and true statement of all of his debts, in so far

as petitioner can now recall; and, so far as it is possible to ascertain, said schedules contain the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of the Acts of Congress embraced in, and generally known as, the Bankruptcy Act; said schedules being marked Exhibit A, and being verified by petitioner's oath;

That petitioner also files herewith, marked Exhibit B, and verified by your petitioner's oath, further schedules which contain an accurate inventory of all of petitioner's property, both real and personal, so far as petitioner recalls, and such further statements concerning said property as are required by the provisions of said Acts of Congress;

That if petitioner has by inadvertence omitted to list any of his debts, or any part of his property, he will file a supplemental exhibit covering such ommissions.

[fol. 3] Wherefore, your petitioner prays that he may have leave of court to file this petition, that the same may be referred to the Conciliation Commissioner for Bedford County, that a composition or an extension of time to pay his debts may be effected with petitioner's creditors pursuant to Section 75 of the said Bankruptcy Act, as amended; or that, the effort to effect such compositions or extension of time failing, petitioner may be permitted to amend this, his petition, pursuant to the provisions of said Section 75 if he shall be so advised, to the end that he may be given all further privileges accorded under the terms of said last mentioned section, or of any further provisions of said Bankruptcy Act. And for the benefit of all of the provisions of said Bankruptcy Act petitioner specially prays. And petitioner further prays that all proceedings against him by way of pending and advertised foreclosures of his farming lands, or by other methods contrary to the provisions of said Section 75 of the Bankruptcy Act, or contrary to any other provisions of said Act, may be stayed; and that he may be given such further relief as his case may entitle him to under the Acts of Congress for such case made and provided, or as to equity may seem meet.

Robert Page Wright. S. S. Lambeth, Jr., Attorney, Bedford, Va.

Duly sworn to by Robert Page Wright. Jurat omitted in printing.

[fol. 4] EXHIBITS "A" AND "B" TO PETITION

Manifold Bankruptcy Blanks, Act of 1898

Manufactured and Sold by Beverly Book Company, Booksellers, Stationers, and Office-Outfitters, Staunton, Va.

Summary of Debts and Assets

Filed with Petition & Schedules, 2:30 p. m. Mar. 29, 1935

[From the Statement of the Bankrupt in Schedules A and B]

Schedule A—1 (1)	Taxes and Debts due United	
Schedule A—1 (1)	Taxes and blah blah States	$6,559 50 00
Schedule A—1 (2)	Taxes due States, Counties, Districts and Municipalities	153 06
Schedule A—1 (3)	Wages	00
Schedule A—1 (4)	Other debts preferred by law	00
Schedule A—2	Secured Claims	5,797 80
Schedule A—3	Unsecured Claims	308 64
Schedule A—4	Notes and Bills which ought to be paid by other parties thereto. Exact amount unknown	300 00
Schedule A—5	Accommodation Paper	00
	Schedule A, Total	$6,559 50
Schedule B—1	Real Estate	2,500 00
Schedule B—2-a	Cash on Hand	00

[fol. 5]

Schedule B—2-b	Bills, Promissory Notes, and Securities	00
Schedule B—2-c	Stock in Trade	00
Schedule B—2-d	Household Goods, etc.	152 00
Schedule B—2-e	Books, Prints and Pictures	00
Schedule B—2-f	Horses, Cows and other Animals	173 00
Schedule B—2-g	Carriages and other Vehicles	15 00

EXHIBITS "A" AND "B" TO PETITION—Continued

Schedule B—2-h	Farming Stock and Implements	42 50
Schedule B—2-i	Shipping and Shares in Vessels	00
Schedule B—2-k	Machinery, Tools, etc.	00
Schedule B—2-l	Patents, Copyrights and Trade-Marks	00
Schedule B—2-m	Other Personal Property	00
Schedule B—3-a	Debts on Open Accounts	00
Schedule B—3-b	Stocks, Negotiable Bonds, etc.	00
Schedule B—3-c	Policies of Insurance	00
Schedule B—3-d	Unliquidated Claims	00
Schedule B—3-e	Deposits of Money in banks and elsewhere	00
Schedule B—4	Property in Reversion, Remainder, Trust, etc.	00
Schedule B—5	Property claimed to be exempted	00
Schedule B—6	Books, Deeds and Papers	00
	Schedule B, Total	$2,882 50
	Total	

Robert Page Wright, Petitioner, Vinton, R. F. D. #1 Va.

[fol. 6] IN UNITED STATES DISTRICT COURT

ORDER OF REFERENCE—Entered March 30, 1935

Robert Page Wright, of Bedford County, Virginia, a debtor, having on March 29, 1935, filed his petition under Section 75 of the Bankruptcy Act as amended by the Act of Congress of June 28, 1934, and the said petition appearing to be in proper form and to have been filed in good faith, it is

Ordered that said matter be, and the same is hereby, referred to James H. Rodgers, Esq., Big Island Virginia, Conciliation Commissioner for Bedford County, for further proceedings therein as are required by said section,

and that the said Robert Page Wright shall attend before said conciliation commissioner on the 5th day of April, 1935, at Big Island, Virginia, and thenceforth shall submit to such orders as may be made by said conciliation commissioner or by this court relating to the proceedings under this section.

The Deputy Clerk of this Court at Lynchburg will send an attested copy of this order to S. S. Lambeth, Jr., Esq., Attorney for the debtor, Bedford, Virginia, and a similar copy, together with the debtor's petition, to James H. Rodgers, Esq., Conciliation Commissioner, Big Island, Virginia.

IN UNITED STATES DISTRICT COURT

PROPOSAL TO CREDITORS—Filed September 27, 1935

Before the Conciliation Commissioner for Bedford County on July 27, 1935, to the Honorable Conciliation Commis-
[fol. 7] sioner for Bedford County, and the Creditors of said Debtor:

The undersigned Robert Page Wright, Debtor, respectfully submits the following proposal to his creditors:

Said Debtor has no desire to avoid the payment of his debts in full, if that be possible, although if the first lien creditors see fit to submit a proposition by way of compromise at a figure below the actual amount of said first lien debt, said Debtor will co-operate to the extent of his ability in raising the necessary funds.

But said Debtor does desire to submit a proposal for the extension of the time for the payment of his indebtedness. He suggests and proposes that he be granted a period of twelve months from July 27, 1935, within which to raise the necessary money to pay off the indebtedness against him and against his farm. But if this period is deemed too long, said Debtor is willing to consider a shorter period.

As a part of his proposal for extension said Debtor suggests that a definate effort be made to interest buyers in the purchase of the boxwood on his premises. Said Debtor has been informed that this boxwood once had a fair market value ranging between $1,000 and $1,200.00. He is not informed as to its present market value, but he is making

an effort to ascertain this. While its value has certainly diminished substantially, said Debtor thinks that it is yet sufficiently valuable to enable him to pay up all overdue interest, taxes, insurance premiums, if any are overdue, to provide for any insurance premiums to accrue, to provide for the payment of interest for, say, a year in advance, and to provide for taxes for such period.

Thus the investment would be made a live investment for the first lien creditor during the period indicated. The said Debtor specially asks the co-operation of his creditors and in particular of the first lien creditor towards securing a market for this boxwood, and towards the application of the proceeds from the sale thereof, as above indicated.

Said Debtor would further set forth that there is now pending in the Congress of the United States a bill known as the Frazier-Lemke Refinancing Bill, which provides for [fol. 8] loans up to the full value of farming lands based on existing appraisements, and further provides for an interest rate of only 1½% a year, and for repayment of the principal on the amortized plan at only 1½% per year, making the total annual charge on account of principal and interest of 3%, or, for illustration, of only $90 a year on a loan of $3,000.

This Refinancing Bill has not yet become a law. Said Debtor would not pretend to say that it will become a law. He does know, however, that there is a very strong sentiment in Congress for this Bill and that there is a reasonable probability that it will be enacted into law. He asks the extension aforesaid both because the boxwood may be turned into cash in the near future and because said Refinancing Bill may become a law in the near future.

It is the purpose of the said Debtor to make active effort immediately to sell the boxwood if the creditors shall agree upon this plan, and not to delay by reason of any extension of a year that may be granted him. To this he pledges himself and asks the co-operation of his creditors.

Respectfully submitted, Robert Page Wright. S. S. Lambeth, Jr., Attorney for Debtor, Robert Page Wright.

Endorsed: Before the Conciliation Commissioner, First Creditor's Meeting July 27, 1935.

IN UNITED STATES DISTRICT COURT

REPORT OF CONCILIATION COMMISSIONER—Filed September 27, 1935

In Proceedings Under Section 75 of the Bankruptcy Act

To the Honorable John Paul, Judge of the District Court of the United States for the Western District of Virginia:

[fol. 9] Conciliation Commissioner respectfully reports:

That in the matter of R. Page Wright, Debtor, Docket #3922 the first meeting of the creditors was held at Bedford with the Debtor present and represented by S. S. Lambeth, Jr., Attorney and the largest creditor was represented by Mr. A. C. Harris. The Debtor's attorney presented a plan of extension which plan was not accepted by Mr. Harris. However it was agreed that Mr. Wright and his attorney should be given a reasonable time in which to try to determine the exact amount the boxwood (which was to be sold under the plan of extension offered) could be sold for and when it could be sold and to report back to the Conciliation Commissioner at which time he would call a second meeting of the creditors. This report not having been received and therefore no agreement having been reached I am reporting to Your Honor these facts and asking for further instructions, if any, under the new Bankruptcy Act as amended.

This 25th day of Sept., 1935.

James H. Rodgers, Conciliation Commissioner.

IN UNITED STATES DISTRICT COURT

ORDER TO FILE AMENDED PETITION, ETC.—Entered September 28, 1935

Whereas the above-named Robert Page Wright on March 29, 1935, filed his petition under Section 75 of the Bankruptcy Act, which was duly referred to James H. Rogers, Esq., Conciliation Commissioner, for action thereon, and

Whereas it appears that the debtor has been unable to agree with his creditors upon any terms of composition or

extension of his indebtedness, but that said matter has been [fol. 10] since pending before said conciliation commissioner without any further action thereon,

It is accordingly Ordered that the said debtor shall within 15 days from this date file his amended petition under Section 75 of the Bankruptcy Act as amended by the Act of August 28, 1935, asking to be adjudged a bankrupt, or else shall suffer this proceeding to be dismissed.

It is further Ordered that if the debtor shall within the time limited file his amended petition asking to be adjudged a bankrupt, the same shall be forwarded by the Deputy Clerk of this Court at Lynchburg to the Judge of the Court for action thereon; and in case of the failure of said debtor to file said amended petition within the time limited, that the fact of such failure shall be reported to the Court by the Deputy Clerk at Lynchburg.

It is further Ordered that an attested copy of this order be sent to S. S. Lambeth, Jr., Esq., Attorney for the debtor, Bedford, Virginia, and a copy to James H. Roberts, Conciliation Commissioner, Big Island, Virginia.

IN UNITED STATES DISTRICT COURT

AMENDED PETITION UNDER SECTION 75, SUBSECTION (S) OF THE NATIONAL BANKRUPTCY ACT—Filed October 8, 1935

To the Honorable John Paul, Judge of the District Court of the United States for the Western District of Virginia, Lynchburg Division:

The Petition of Robert Page Wright of Stewartsville, in the County of Bedford (P. O. Vinton, R. 1, Va.), Western District, State of Virginia, farmer,

Respectfully Represents: That he has resided in Bedford County, Virginia, all his life within said Judicial District; that on March 29, 1935, he filed his petition as debtor, under Section 75 of the National Bankruptcy Act; that he failed to obtain the acceptance of any of his creditors of his [fol. 11] proposal for composition or extension as appears by order of Court herein entered September 28, 1935; that he now files his amended petition under subsection (s) of said Section 75; that he owes debts which he is unable to

pay in full; that he is willing to surrender all his property for the benefit of his creditors except such as is exempt by law, and desires to obtain the benefit of the Acts of Congress relating to Bankruptcy.

That the schedule heretofore annexed, to his said petition filed as debtor on March 29, 1935, marked A [1, 2, 3, 4, 5], and verified by your petitioner's oath, contains a full and true statement of all his debts, and (so far as it is possible to ascertain) the names and places of residence of his creditors and such further statements concerning said debts as are required by the provisions of said acts.

That the schedule heretofore annexed, to said petition (marked B [1, 2, 3, 4, 5, 6], and verified by your petitioner's oath, contains an accurate inventory of all his property, both real and personal, and such further statements concerning said property as are required by the provisions of said acts.

That petitioner has not been granted a discharge in bankruptcy within six years.

Wherefore Your Petitioner Prays, That he may be adjudged by the Court to be a bankrupt within the purview of said acts, and that he may have all of the benefits of the provisions of said sub-section (s), as amended, and approved August 28, 1935.

Robert Page Wright, Petitioner, Post Office, Vinton, R. 1, Va. S. S. Lambeth, Jr., Attorney for Petitioner, P. O. Drawer 236, Bedford, Va.

Duly sworn to by Robert Page Wright. Jurat omitted in printing.

[fol. 12] All the Schedules must be filed in triplicate with this Petition. If Schedules are not filed with Petition use form 801A. (Act of May 27, 1926.)

Oaths required by this act, except upon hearings in Court, may be administered by (1) referees; (2) officers authorized to administer oaths in proceedings before the courts of the United States, or under the laws of the State where the same are to be taken; and (3) diplomatic or consular officers of the United States in any foreign country (Bankruptcy Act of 1898, c. 4, Sec. 20).

IN UNITED STATES DISTRICT COURT

ORDER OF ADJUDICATION—Entered October 12, 1935

The above named debtor having heretofore filed his petition under Section 75 of the Bankruptcy Act and having failed to obtain an agreement with his creditors upon any terms of composition or extension and having on the 8th day of October, 1935, filed his amended petition under the provisions of Subsection (s) of Section 75 of the Bankruptcy Act as amended by the Act of August 28, 1935, praying that he be adjudged a bankrupt, it is accordingly

[fol. 13] Ordered that the said Robert Page Wright be, and he is hereby, adjudged a bankrupt and that this matter be referred to James H. Rogers, Esq., Conciliation Commissioner, at Big Island, Virginia, for further proceedings thereon in accordance with the provisions of Subsection (s) of said Section 75 of the Bankruptcy Act.

The Deputy Clerk of this Court at Lynchburg will send an attested copy of this order to S. S. Lambeth, Jr., Esq., Attorney for the debtor, at Bedford, Virginia, and the papers in the cause, together with a copy of this order, to James H. Rogers, Esq., Conciliation Commissioner, Big Island, Virginia.

IN UNITED STATES DISTRICT COURT

ORDER GRANTING MOTION TO DISMISS—Entered January 8, 1936

In the Matter of ROBERT PAGE WRIGHT, Bankrupt

The above-named bankrupt having heretofore filed his petition under Section 75 of the Bankruptcy Act and it appearing that he was unable to agree with his creditors upon any terms of composition or extension of his indebtedness; and he thereafter having filed his amended petition under Subsection (s) of Section 75 of the Bankruptcy Act, which proceedings have been pending before a conciliation commissioner;

And the Vinton Branch of the Mountain Trust Bank having submitted its motion to this Court that the proceedings before the conciliation commissioner be terminated and that

this case be dismissed upon the ground that Subsection (s) of said Act is unconstitutional in that it deprives said creditor of its property without due process of law and that the debtor is not entitled to pursue the remedies and privileges granted therein; and the Court being of the opinion that the [fol. 14] provisions of Subsection (s) of Section 75 of said Act are unconstitutional, for the reasons heretofore set forth by it in the case of John Clayton Sherman, it is accordingly

Ordered that the said motion be granted and that the said petition be dismissed and all proceedings thereon be terminated.

The Deputy Clerk of this Court at Lynchburg will send an attested copy of this order to S. S. Lambeth, Jr., Attorney for the bankrupt, and a similar copy to the conciliation commissioner to whom this cause was referred.

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

In the Matter of ROBERT PAGE WRIGHT, Bankrupt

ASSIGNMENT OF ERRORS—Filed April 8, 1936

To the Honorable Judges of the United States Circuit Court of Appeals for the Fourth Circuit:

And the said Robert Page Wright, Bankrupt, and petitioner herein, assigns the following error in the record and proceedings in said cause:

The District Court of the United States for the Western District of Virginia erred in holding unconstitutional subsection (s) of Section 75, of the National Bankruptcy Act, approved August 28, 1935, and known as the amended Frazier-Lemke Moratorium Act, in that said subsection (s), as amended, under which petitioner proceeded, is an Act of [fol. 15] Congress which was framed and phrased with the definite object in view of conforming said Act to the decision and the opinion of the learned Supreme Court of the United States announced in the case of the Louisville Joint Stock Land Bank v. Radford, in which case the original Frazier-Lemke Act was held unconstitutional.

Said petitioner respectfully submits that under the present Frazier-Lemke Moratorium Act no single right is conferred upon the debtor which is not subject to the veto of

the creditor or to the discretion of the Court, that as said Act confers no vested right upon the debtor, it cannot and does not deprive the creditor of any vested right and that if it does not deprive the creditor of a vested right, or of any right, it cannot violate any constitutional provision.

For which error the said Robert Page Wright, Bankrupt, and petitioner herein, prays that the said decretal order of the said United States District Court for the Western District of Virginia, dated the 8th day of January, 1936, in the above-entitled cause, be reversed, and the cause remanded with direction to said District Court to take such proceedings as Your Honors may deem proper, and for such other and further relief as may be proper in the premises.

Robert Page Wright, Bankrupt, Petitioner; S. S. Lamberth, Jr., Attorney and Solicitor for Petitioner, Bedford, Virginia.

STATE OF VIRGINIA, to-wit:

Subscribed and sworn to before me this 25th day of January, 1936, by Robert Page Wright, Bankrupt.

Frank L. Mitchell, Notary Public for Roanoke County, Va. My commission expires the 19th day of April in the year 1937. (Seal.)

[fol. 16] IN UNITED STATES DISTRICT COURT

STIPULATION AS TO CONTENTS OF RECORD—Filed April 20, 1936

It is stipulated and agreed between counsel as follows:

The record on appeal in the above entitled cause shall consist of the following items—

(1) The original petition filed in the District Court of the United States for the Western District of Virginia, for composition or extension.

(2) The Summary of debts and assets filed with said last named petition. Said summary is found on the last sheet of the schedules filed by said Robert Page Wright, and shows the totals of his schedules A and B.

(3) A copy of the order of the said District Court of the United States, entered in said cause on the 30th day of March, 1935.

(4) A copy of the proposal of said Robert Page Wright to his creditors for extension, which proposal was filed before the Conciliation Commissioner for Bedford County on July 27, 1935.

(5) A copy of the report of said conciliation commissioner dated the 25th day of September, 1935, and likewise a copy of any other report, or reports, if any, which have been filed by said conciliation commissioner.

(6) A copy of the order of said District Court entered on the 28th day of September, 1935.

(6a) A copy of the Amended Petition filed by said Robert Page Wright.

[fol. 17] (7) A copy of the order of said District Court entered on the 12th day of October, 1935.

(8) A copy of the order of said District Court entered on the 8th day of January, 1936.

(9) The data required by section (7) of Rule 14, of the United States Circuit Court of Appeals for the Fourth Circuit.

(10) The petition for appeal and the assignment of errors and prayer for relief, filed by said Robert Page Wright, in the United States Circuit Court of Appeals for the Fourth Circuit.

(11) The stipulations of counsel.

(12) Any other paper, document or matter, which the Judge of the District Court of the United States for the Western District of Virginia may deem necessary or proper to complete the record, or to correct any inadvertence.

(13) The record shall be printed under the supervision of the Clerk of the Circuit Court of Appeals for the Fourth Circuit in accordance with Rule 23.

(14) It is agreed, subject to the approval of the Courts, that any other document or record, which may have been omitted by oversight, or which may be subsequently deemed necessary, by any party to this proceeding, may be made a part of the record.

Robert Page Wright, Bankrupt, by S. S. Lambeth, Jr., Solicitor. Vinton Branch of the Mountain Trust Bank, of Roanoke, Virginia, by John Strickler, Solicitor. A. C. Harris, Trustee, by John Strickler, Solicitor.

[fol. 18] IN UNITED STATES DISTRICT COURT

MEMORANDUM OF CLERK

(As Required by Section 7, Rule 14)

1. Petition for Appeal Filed April 8, 1936.

2. Order Allowing Appeal, signed by Judge, John J. Parker, Judge U. S. Circuit Court of Appeals for the Fourth Circuit, April 6, 1936, received and entered in U. S. District Court, W. Dist. of Va., at Lynchburg, April 8th, 1936.

3. Bond, for costs, in penalty of $250.00. W. A. Fitzpatrick, as principal, and E. D. English, as surety. Approved April 20, 1936.

4. Citation, dated April 6, 1936. Service of the within citation is accepted, and legal service thereof is waived by the undersigned, this 15th day of April, 1936. Vinton Branch of the Mountain Trust Bank of Roanoke, Virginia, by John Strickler, Its Attorney. A. C. Harris, Trustee, By John Strickler, His Attorney.

C. E. Gentry, Clerk, by Louis H. Price, Deputy Clerk.

IN UNITED STATES DISTRICT COURT

ORDER TO TRANSMIT RECORD

And thereupon it is ordered by the Court here that a transcript of the record and proceedings in the cause aforesaid, together with all things thereunto relating; be transmitted to the United States Circuit Court of Appeals for the Fourth Circuit; and the same is transmitted accordingly.

C. E. Gentry, Clerk, by Louis H. Price, Deputy Clerk.

[fols. 19-20] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 21] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 4016

ROBERT PAGE WRIGHT, Bankrupt, Appellant,

versus

VINTON BRANCH OF THE MOUNTAIN TRUST BANK OF ROANOKE, VIRGINIA, and A. C. HARRIS, Trustee, Appellees

On Appeal to Superintend and Revise, in Matter of Law, Proceedings of the District Court of the United States for the Western District of Virginia, at Lynchburg. In Bankruptcy

DOCKET ENTRIES

February 3, 1936, petition for an appeal under section 24b of the Bankruptcy Act, together with certified copy of order of District Court and assignment of errors filed, and petition docketed.

Same day, the appearance of S. S. Lambeth, Jr. is entered for the appellant.

April 6, 1936, (April term, 1936) petition for an appeal under section 24b of the Bankruptcy Act is presented in Open Court and argument had in support thereof before Parker, Northcott and Soper, Circuit Judges, and submitted.

[fol. 22] Same day, order allowing appeal and fixing cost bond at $250 is filed.

Same day, citation, signed by Judge Parker, is issued. Returnable within forty days.

April 7, 1936, the original petition for appeal, certified copy of order of District Court, assignment of errors, order allowing appeal, and citation are transmitted to the Clerk of the District Court at Lynchburg, Va., in accordance with Rule 36.

April 25, 1936, the transcript of record is filed.

Same day, the original petition for appeal, certified copy of order of District Court, order allowing appeal, and citation are returned by the Clerk of the District Court.

Same day, the original bond is certified up in accordance with section 7 of Rule 14.

April 28, 1936, the original assignment of errors are returned by the Clerk of the District Court.

May 1, 1936, twenty-five copies of the printed record are filed.

May 2, 1936, the appearance of John Strickler is entered for the appellees.

May 28, 1936, the appearance of Wm. Lemke is entered for the appellant.

Argument of Cause

June 16, 1936, (June term, 1936) cause came on to be heard, together with Nos. 4019, 4023, 4036, 4051 and 4069, before Parker, Northcott and Soper, Circuit Judges, and is argued by counsel and submitted.

[fols. 23-24] In United States Circuit Court of Appeals, Fourth Circuit

[Titles omitted]

[fol. 25] (Argued June 16, 1936. Decided October 6, 1936)

[fol. 26] Before Parker, Northcott and Soper, Circuit Judges

S. S. Lambeth, Jr., Ted Dalton and William Lemke (Philip Williams and G. E. Pence on brief) for Appellants, and John Strickler; William D. Staples; S. V. Kemp and F. S. Tavenner (Samuel H. Williams; B. B. Campbell; Showalter, Parsons, Kuyk & Coleman; John S. Draper; Hal C. Tyler and W. J. Henson on brief) for Appellees.

Opinion—Filed October 6, 1936

Parker, Circuit Judge:

These are six appeals from the same district in cases wherein relief was sought under the amended Frazier-Lemke Act. Act of Aug. 28, 1935, Sec. 6, 49 Stat. 942, 11 U. S. C. A. 203(s). The learned judge below, for reasons set forth in his opinion in In re Sherman 12 Fed. Supp. 297, denied the relief prayed in each of the cases on the ground that the act was violative of rights guaranteed by the Constitution, and the debtors have appealed. The appeals were heard together in this court and together they

present but one question, i. e. the constitutional validity of the amended Frazier-Lemke Act.

In Louisville Bank v. Radford 295 U. S. 555, the original Frazier-Lemke Act was held violative of the Fifth Amendment to the Constitution of the United States in that it deprived the holder of an antecedent Kentucky mortgage of the following rights with respect to his security, viz.:

"1. The right to retain the lien until the indebtedness thereby secured is paid.

"2. The right to realize upon the security by a judicial public sale.

[fol. 27] "3. The right to determine when such sale shall be held, subject only to the discretion of the court.

"4. The right to protect its interest in the property by bidding at such sale whenever held, and thus to assure having the mortgaged property devoted primarily to the satisfaction of the debt, either through receipt of the proceeds of a fair competitive sale or by taking the property itself.

"5. The right to control meanwhile the property during the period of default, subject only to the discretion of the court, and to have the rents and profits collected by a receiver for the satisfaction of the debt."

The amended act by its terms applies to existing mortgages as well as to those subsequently executed and those here involved were in existence at the time of its passage. As pointed out by the learned judge below the rights of the secured creditor under the laws of Virginia are not materially different, for the purposes of this inquiry, from the rights recognized by the law of Kentucky (Code of Virginia sec. 5167); and we agree with him that these rights, as specified in paragraphs 3 and 5 of the above quotation, are violated by the amended act, i. e. the right to determine when the mortgage sale shall be held, subject only to the discretion of the court, and the right to control meanwhile the property, subject only to the discretion of the court, and to have the rents and profits collected by a receiver for the satisfaction of the debt.

The amended act provides that any farmer who fails to obtain the acceptance of a majority in number and amount of all creditors whose claims are affected by a composition

or extension proposal, or who feels aggrieved by the composition or extension, may ask that he be adjudged a bankrupt, that his property be appraised, that the exemptions allowed by state law be allotted to him and that he be allowed to retain possession under the supervision and control of the court of the remainder of his property. The act then prescribes the duty of the court in the premises in subsections (1), (2) and (3), which are the ones material to [fol. 28] the inquiry before us, and which for convenience of reference are inserted in the margin.*

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* "(1) After the value of the debtor's property shall have been fixed by the appraisal herein provided, the referee shall issue an order setting aside to such debtor his unencumbered exemptions, and his unencumbered interest or equity in his exemptions, as prescribed by the State law, and shall further order that the possession, under the supervision and control of the court, of any part or parcel or all of the remainder of the debtor's property shall remain in the debtor, as herein provided for, subject to all existing mortgages, liens, pledges or encumbrances. All such existing mortgages, liens, pledges, or encumbrances shall remain in full force and effect, and the property covered by such mortgages, liens, pledges, or encumbrances shall be subject to the payment of the claims of the secured creditors, as their interests may appear.

"(2) When the conditions set forth in this section have been complied with, the court shall stay all judicial or official proceedings in any court, or under the direction of any official, against the debtor or any of his property, for a period of three years. During such three years the debtor shall be permitted to retain possession of all or any part of his property, in the custody and under the supervision and control of the court, provided he pays a reasonable rental semiannually for that part of the property of which he retains possession. The first payment of such rental shall be made within one year of the date of the order staying proceedings, the amount and kind of such rental to be the usual customary rental in the community where the property is located, based upon the rental value, net income, and earning capacity of the property. Such rental shall be paid into court, to be used, first, for payment of taxes and upkeep of the property, and the remainder to be distributed among

An examination of these sections discloses that, with respect to the time of foreclosure, the court is required to enter an order that "the possession under the supervision and control of the court, of any part or parcel or all of the remainder of the debtor's property shall remain in the debtor, as herein provided for", subject to existing mortgages, etc.; and the court is required to stay foreclosure proceedings for a period of three years. The court, it is true, may require the debtor to make payments on the principal of the indebtedness "not inconsistent" with his "ability to pay, with a view to his financial rehabilitation", and may direct sale if the debtor fails to comply with this requirement. And, under section 6 of the act, the court may shorten the stay of proceedings if it shall determine that [fol. 29] emergency which gave rise to the act has ceased to exist. But we think it clear that these are far from preserving to the secured creditor the right to immediate foreclosure on default which is given him by the law of Virginia; and they are far different from the judicial discretion exercised by a court of equity in an ordinary

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the secured and unsecured creditors, and applied on their claims, as their interests may appear. The court, in its discretion, if it deems it necessary to protect the creditors from loss by the estate, and/or to conserve the security, may order sold any unexempt perishable property of the debtor, or any unexempt personal property not reasonably necessary for the farming operations of the debtor, such sale to be had at private or public sale, and may, in addition to the rental, require payments on the principal due and owing by the debtor to the secured or unsecured creditors, as their interests may appear, in accordance with the provisions of this title, and may require such payments to be made quarterly, semiannually, or annually, not inconsistent with the protection of the rights of the creditors and the debtor's ability to pay, with a view to his financial rehabili-ation.

"(3) At the end of three years, or prior thereto, the debtor may pay into court the amount of the appraisal of the property of which he retains possession, including the amount of encumbrances on his exemptions, up to the amount of the appraisal, less the amount paid on principal: Provided, That upon request of any secured or unsecured

foreclosure proceeding, with respect to which the rights of a mortgage creditor may be presumed to have been acquired. See Louisville Bank v. Radford, supra, 295 U. S. 555, 597.

Likewise as to the control of the property preceding foreclosure, an examination of the statute discloses that, instead of providing for possession by a receiver with application of the rents and profits to the mortgage debt, the debtor is permitted to retain possession, upon such rent as the court may determine, to be applied first to taxes upon the upkeep of the property, i. e. in a manner which will be for the benefit of the debtor, whether the creditor [fol. 30] wishes such application or not. This is clearly not the same thing as the right to which the creditor is entitled under the law of Virginia, or the equivalent thereof.

Cases in which this statute has been considered and held invalid are U. S. Nat. Bank of Omaha v. Pamp (C. C. A. 8th) 83 Fed. (2d) 493; In re Lowmon (C. C. A. 7th)

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creditor, or upon request of the debtor, the court shall cause a reappraisal of the debtor's property, or in its discretion set a date for hearing, and after such hearing, fix the value of the property, in accordance with the evidence submitted, and the debtor shall then pay the value so arrived at into court, less payments made on the principal, for distribution to all secured and unsecured creditors, as their interests may appear, and thereupon the court shall, by an order, turn over full possession and title of said property, free and clear of encumbrances to the debtor: Provided, That upon request in writing by any secured creditor or creditors, the court shall order the property upon which such secured creditors have a lien to be sold at public auction. The debtor shall have ninety days to redeem any property sold at such sale, by paying the amount for which any such property was sold, together with 5 per centum per annum interest, into court, and he may apply for his discharge, as provided for by this title. If, however, the debtor at any time fails to comply with the provisions of this section, or with any orders of the court made pursuant to this section, or is unable to refinance himself within three years, the court may order the appointment of a trustee, and order the property sold or otherwise disposed of as provided for in this title."

79 Fed. (2d) 887; In re Young (D. C. Ill.) 12 Fed. Supp. 30; In re Lindsay (D. C. Ia.) 12 Fed. Supp. 625; In re Davis (D. C. N. Y.) 13 Fed. Supp. 221; In re Diller (D. C. Cal.) 13 Fed. Supp. 249; In re Tschoepe (D. C. Tex.) 13 Fed. Supp. 371; In re Schoenleber (D. C. Neb.) 13 Fed. Supp. 375; In re Wogstad (D. C. Wyo.) 14 Fed. Supp. 72. Contra, see Dallas Joint Stock Land Bank v. Davis (C. C. A. 5th) 83 Fed. (2d) 322; In re Slaughter 13 Fed. Supp. 893, id. 12 Fed. Supp. 206; In re Bennett 13 Fed. Supp. 353; In re Cole 13 Fed. Supp. 283; In re Reichert 13 Fed. Supp. 1.

The decision of the Supreme Court in Louisville Bank v. Radford, supra, as we interpret it, is that Congress may not in the exercise of the bankruptcy power substantially impair the rights of a mortgagee of a bankrupt's property, and that to take from him the right to determine when the sale of the mortgaged property shall be held and to control the property in the meantime, is such substantial impairment. We can see no ground for distinction in that the amended act grants a moratorium of three instead of five years or that the court is authorized to shorten the moratorium if it shall determine that the emergency has ceased to exist. Even if the last named provision be constitutional, it does not remove the objection that during the moratorium allowed the rights of the mortgagee are abridged; but it would seem that such a provision violates the constitutional requirement of geographical uniformity and would be void for that reason even if not given the effect of invalidating the remainder of the act. A law which extends the benefit of its provisions to certain judicial districts of the country and not to others, depending upon a finding by the courts as to local financial conditions, is manifestly not a uniform law on the subject of bankruptcies within the constitutional requirement. U. S. Nat. Bank of Omaha v. Pamp (C. C. A. 8th) 83 Fed. (2d) 493, 502.

[fol. 31] In No. 4023, appeal was not sought under Section 24(b) of the Bankruptcy Act but was allowed by the judge below under 25(a). As the order appealed from dismissed a petition for adjudication under subsection (s) of Section 75 of the Bankruptcy Act and refused to adjudicate petitioner a bankrupt thereunder, we think that appeal under 25(a) was proper, although appeal under 24(b) is

proper from an order denying injunctive relief under the statute. Bradford v. Fahey (C. C. A. 4th) 76 Fed. (2d) 628.

Affirmed.

In United States Circuit Court of Appeals, Fourth Circuit

No. 4016

Robert Page Wright, Bankrupt, Appellant,

vs.

Vinton Branch of the Mountain Trust Bank of Roanoke, Virginia, and A. C. Harris, Trustee, Appellees

On Appeal to Superintend and Revise, in Matter of Law, Proceedings of the District Court of the United States for the Western District of Virginia

Judgment—Filed and Entered October 6, 1936

[fol. 32] This Cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of Virginia, and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the order of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed with costs.

October 6th, 1936.

John J. Parker, Senior Circuit Judge.

October 17, 1936, petition of appellant for a stay of the mandate is filed.

In United States Circuit Court of Appeals

Order Staying Mandate—Filed and Entered October 22, 1936

It is Ordered that the mandate of this Court in each of the above causes be, and the same are hereby stayed, pending the application of said Appellants or any one or more

of them in the Supreme Court for a writ of certiorari to this Court, unless otherwise ordered by this or the said Supreme Court, and provided said application or applications are filed in the said Supreme Court on or before November 6, 1936.

It is Further Ordered that the time within which the parties hereto may apply for a rehearing in any of said causes is hereby extended for said period; and in the event certiorari is granted by the Supreme Court in said causes or in any one or more of them the time for applying for a rehearing is hereby extended for a period of 15 days after decision of the Supreme Court in said cause or causes.

October 22, 1936.

John J. Parker, Senior Circuit Judge.

[fol. 33] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 34] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed December 21, 1936

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 41,070. U. S. Circuit Court of Appeals, Fourth Circuit. Term No. 530. Robert Page Wright, Bankrupt, petitioner, vs. Vinton Branch of The Mountain Trust Bank of Roanoke, Virginia, and A. C. Harris, Trustee. Petition for a writ of certiorari and exhibit thereto. Filed November 16, 1936. Term No. 530, O. T., 1936.

FILE COPY

FILED
NOV 16 1936
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 530

ROBERT PAGE WRIGHT, BANKRUPT,
Petitioner,

vs.

VINTON BRANCH OF THE MOUNTAIN TRUST BANK OF ROANOKE, VIRGINIA, AND A. C. HARRIS, TRUSTEE.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 530

ROBERT PAGE WRIGHT, BANKRUPT,
Petitioner,

vs.

VINTON BRANCH OF THE MOUNTAIN TRUST BANK OF ROANOKE, VIRGINIA, AND A. C. HARRIS, TRUSTEE.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Robert Page Wright, a resident of the county of Bedford, in the State of Virginia, respectfully shows that he is aggrieved by an order of the Honorable United States Circuit Court of Appeals for the Fourth Circuit, entered on the 6th day of October, 1936 (R. 31-32), affirming an order of the District Court of the United States for the Western District of Virginia, declaring unconstitutional Subsection (s) of Section 75 of the National Bankruptcy Act, as amended by the Act of Congress of August 28, 1935, c. 792, Sec. 6, 49 Stat. 942; Title 11, U. S. C. A.

203 (s), known as the Amended Frazier-Lemke Moratorium Act, and petitioner files this his petition for a writ of certiorari to review the proceedings had in said United States Circuit Court of Appeals for the Fourth Circuit.

Petitioner files herewith a certified transcript of the record in said case, together with a supporting brief as required by the Rules of this Honorable Court.

I. Summary and Short Statement of the Matter Involved.

Petitioner's case is one of six cases, heard together (R. 23, *et seq.*), and, employing the language of the opinion of the learned United States Circuit Court of Appeals (R. 26):

> "The appeals were heard together in this Court and together they present but one question, *i. e.*, the constitutional validity of the amended Frazier-Lemke Act."

The learned Senior Circuit Judge (Parker), who delivered the opinion of the United States Circuit Court of Appeals for the Fourth Circuit, has made marginal quotation of the pertinent clauses of the Act (Section 75, subsection (s), of the National Bankruptcy Act) in his opinion (R. 27, *et seq.*), to which petitioner now makes reference.

The following quotation from petitioner's petition for composition or extension of time, etc., will suffice to present the peculiar facts of petitioner's case (R. 1 and 2):

> "Your petitioner, Robert Page Wright, fifty-two years of age, who is a resident of the County of Bedford, in the Western District of the State of Virginia, residing on his farm, situate about one-half mile from the village known as Old Stewartsville, represents to Your Honor as follows:
>
> "That he is a farmer, operating and owning, subject to liens, a tract of land containing about fifty-nine acres in one body of land; that he is unable to meet his debts as they mature; that, his said real estate

would under normal economic conditions be worth substantially more than the amount of his obligations, but that said property, under the existing conditions, would probably bring substantially less than his obligations, and that, in this sense, petitioner represents that he is insolvent, or unable to meet his debts as they mature, and that it is desirable to effect a composition or an extension of time to pay his debts.

"Petitioner further represents that he is fifty-two years of age, that he is married, that his wife, Girtie F. Wright, resides with him in the Mansion House on said farm; that petitioner and his said wife have four children, three of whom are above the age of twenty-one years. Two of said children reside with petitioner who for three years has been incapacitated for active work by reason of invalidism—heart affection."

The case was referred to the Conciliation Commissioner (R. 6). A meeting of the creditors was called at which the debtor made a written proposal for extension of the time for payment of his debts, specially asking time for the marketing of valuable boxwood on his premises (R. 6, *et seq.*).

The Conciliation Commissioner reported to the District Court that the creditors declined to accept the debtor's proposal for extension (R. 9), and the learned District Court entered an order (R. 9) providing that the proceedings should be dismissed unless within fifteen days the debtor should file his petition praying to be adjudged a bankrupt under Section 75, Subsection (s), as amended by the Act of August 28, 1935.

Petitioner filed his amended petition under said last mentioned section, praying to be adjudged a bankrupt, and praying that he might have all the benefits of said section (R. 10); and petitioner was by order of said District Court adjudged a bankrupt, and the case was referred back to the Conciliation Commissioner for proceedings under said

Subsection (s) of Section 75 of the Bankruptcy Act, as amended (R. 12).

The Vinton Branch of the Mountain Trust Bank having moved to dismiss the proceedings "upon the ground that Subsection (s) of said Act is unconstitutional in that it deprives said creditor of its property without due process of law," by order entered January 8, 1936 (R. 13), the motion was granted, and the proceedings were terminated.

From this order petitioner was allowed an appeal by the United States Circuit Court of Appeals for the Fourth Circuit, 1936 (R. 18), on assignment of errors duly filed (R. 14). The case having been argued, the learned United States Circuit Court of Appeals for the Fourth Circuit in an opinion (set forth in full, R. 26, *et seq.*) affirmed the learned District Court's judgment holding the said Act unconstitutional, and entered its order accordingly (R. 31-32).

II. **Reasons Relied Upon for Granting the Writ of Certiorari.**

(a) In the case of *Dallas Joint Stock Land Bank of Dallas, Texas* v. *Davis,* 83 F. (2d) 322, the United States Circuit Court of Appeals for the Fifth Circuit decided May 5, 1936, Subsection (s) of Section 75 of the National Bankruptcy Act was declared constitutional; while in the case of *United States National Bank of Omaha* v. *Pamp,* United States Circuit Court of Appeals for the Eighth Circuit, 83 F. (2d) 493, decided May 11, 1936, and in the case of *Lafayette Life Insurance Co.* v. *Lowman,* Circuit Court of Appeals for the Seventh Circuit, 79 F. (2d) 887, the same Act was declared unconstitutional.

And there is a yet wider variance in the decisions of the District Courts of the United States, as petitioner will show in his supporting brief.

There are, in addition, several cases now pending, and undecided, in the United States Circuit Courts of Appeals for other Circuits. Thus conflicting decisions throw the law into confusion and call for an authoritative final deliverance by the Supreme Court.

(b) Further, petitioner is advised that the decisions against the constitutionality of said amended Subsection (s) of Section 75 of the National Bankruptcy Act are probably untenable, or are in conflict with the weight of authority, from the standpoint of the applicable decisions of the Supreme Court of the United States; that all of the decisions of the Federal courts of inferior jurisdiction as to the constitutionality of said Act, whether pro or contra, constitute decisions of an important question of Federal law, which has not been, but should be, settled by this Honorable Court; and that all such decisions against the constitutionality of said Amended Frazier-Lemke Act are probably in conflict with applicable decisions of this Honorable Court.

(c) That, aside from all other considerations, property rights running into vast sums of money, affecting with uncertainty and with suspense both creditor and debtor, and arising in every section, almost in every locality, of the Nation, are involved in the administration of the Act under consideration, and that the necessity for one uniform statement of the law is not only apparent, but is an economic necessity.

WHEREFORE, petitioner prays that a writ of certiorari may issue under the seal of this Honorable Court in this cause, directed to the Honorable United States Circuit Court of Appeals for the Fourth Circuit, commanding said Court to certify and transmit to this Honorable Court, in manner and form as provided by law, a complete tran-

script of the record and all proceedings had in said Circuit Court of Appeals in this cause, to the end that this cause may be reviewed and determined by this Honorable Court, and that petitioner may be granted such other and further relief as his case may entitled him to, or as to equity shall seem meet.

And petitioner will ever pray.

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Errors Complained of.

Is the Amended Frazier-Lemke Act, Sec. 75, Subsection (s), Bankruptcy Act, constitutional? (Act of Congress August 28, 1935, Sec. 6, 49 Stat. 942; 11 U. S. C. A., Sec. 203 (s).)

For Assignment of Errors in the Court below, see Record, page 14.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 530

ROBERT PAGE WRIGHT, BANKRUPT,
Petitioner,

vs.

VINTON BRANCH OF THE MOUNTAIN TRUST BANK OF ROANOKE, VIRGINIA, AND A. C. HARRIS, TRUSTEE.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Statement of Matter Involved.

For statement of the facts and proceedings reference is made to the petition for writ of certiorari and to the copy of the Record filed therewith.

The Sole Question Presented.

Is the Amended Frazier-Lemke Moratorium Act constitutional? The Act in question is Subsection (s) of Section 75 of the National Bankruptcy Act, as amended by Act of Congress dated August 28, 1935, Sec. 6, 49 Stat. 942; 11 U. S. C. A., Sec. 203 (s).

The text of the Act is set forth in the margin of the opinion of the learned Circuit Court of Appeals. The opinion of the court will be found in the Transcript of Record, p. 26, *et seq.*

The Two Opinions of the Learned Circuit Court of Appeals for the Fourth Circuit.

The original Subsection (s) of Section 75 of the National Bankruptcy Act, known as the original Frazier-Lemke Act, the provisions of which, we assume no one will deny, were far more drastic and radical from a constitutional outlook than are the provisions of the Amended Act, was upheld and declared constitutional by the Circuit Court of Appeals for the Fourth Circuit in an exhaustive opinion by Judge Parker in the case of *William W. Bradford, Jr., Bankrupt, Appellant*, v. *Michael W. Fahey, Assignee, et al.*, 76 F. (2d) 628. Subsequently, the Supreme Court of the United States having declared the original Frazier-Lemke Act unconstitutional in the case of *Louisville Joint Stock Land Bank* v. *William W. Radford, Sr.*, 295 U. S. 555, on petition for rehearing filed in the above mentioned case of *Bradford* v. *Fahey*, the previous decision was set aside and the court below (the District Court of the United States for the District of Maryland) was affirmed. 77 F. (2d) 992.

In the case at bar, the *Robert Page Wright* case, which arises under the Amended Act, the learned Court, expressly referring to the controlling precedent of the *Radford* case, in a brief opinion holds the Amended Frazier-Lemke Act unconstitutional.

Petitioner respectfully contends that the Amended Frazier-Lemke Act with studied purpose, takes note of, and corrects, all of the unconstitutional features of the original Frazier-Lemke Act, and that, therefore, the learned Circuit Court of Appeals for the Fourth Circuit erred in declaring the Amended Act unconstitutional.

Argument.

We have had access to some briefs on each side of the question at issue which may, without exaggeration, be styled learned briefs. But it seems to us that these briefs, because they enter fields of discussion that have no logical relation to the question now presented, tend to becloud rather than to illumine discussion.

Unless we misconceive the issue, it lies within a narrow compass. Therefore, we shall seek to avoid entering this wide field of research, of argument, and of citation. It is our view that every postulate of law which bears upon the case at bar is wrapped in the opinion of Mr. Justice Brandeis delivered in the case of *Louisville Joint Stock Land Bank* v. *Radford, supra,* read in the light of a very few other decisions of the Supreme Court of the United States, to which we shall advert. To these cases we shall confine ourselves.

Our discussion will deal with two generic inquiries:

First. To what principles of law, cognate to this subject, has the learned United States Supreme Court tied itself?

Second. Has the Congress, in revising the new Frazier-Lemke Act, brought the Act within the law as declared by the Supreme Court?

We maintain that the amended Subsection (s) of Section 75 of the National Bankruptcy Act is constitutional; that it does violence to not one section of the Constitution; that it is a legitimate exercise of the Congressional prerogative; tersely granted by Subsection 4 of Section 8 of Article 1 of the Constitution:

> "To establish an uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States."

To support our argument we shall, first, seek to present the law as settled in the *Radford* case, that is to say, to what extent Congress may go within the limit of the Constitution; and, second, to discover whether the amended Frazier-Lemke Act (Subsection (s) of Section 75) inveighs against any principle announced in the *Radford* case.

We submit that the United States Supreme Court has in effect already sanctioned the amended Frazier-Lemke Act.

This anticipatory sanction is found in the case of *Home Building and Loan Association* v. *Blaisdell,* 290 U. S. 398.

This is the *Minnesota Moratorium* case, in which the order of the Supreme Court of Minnesota declaring a two-year moratorium statute valid was affirmed by the United States Supreme Court.

The syllabus of the Court's opinion very accurately reflects the holdings of the Court found in the text. Numerous propositions are laid down; but the gist of the decision is found in paragraphs 6 and 7 of the syllabus. We quote these:

> "6. The obligation of a contract is not impaired by a law modifying the remedy for its enforcement but not so as to impair substantial rights secured by the contract.
>
> "7. Decisions of this court in which statutes extending the period of redemption from foreclosure sales were held unconstitutional do not control where the statute in question safeguards the interests of the mortgagee-purchaser by conditions imposed on the extension."

Is not the amended Frazier-Lemke Act but an adaptation and an expression of this principle?

We shall herein assume to demonstrate from an analysis of the text of this Act that it does "safeguard the interests of the mortgagee-purchaser".

On the other hand the case of *W. B. Worthen Co.* v. *Kavanaugh,* 295 U. S. 56, well illustrates, from the standpoint of the United States Supreme Court's holding, the points of differentiation between a reasonable moratorium statute, as in the *Blaisdell* case, involving the Minnesota Moratorium statute, and an unreasonable and unconstitutional statute, as in the case of *Worthen Co.* v. *Kavanaugh,* involving an Arkansas statute.

With respect to these two cases the Supreme Court has this to say in its opinion in the case of *Louisville Joint Stock Land Bank* v. *Radford,* 295 U. S. 578:

> "Since entry of the judgment of the Court of Appeals, this court has held unconstitutional provisions of state legislation in some respects comparable to the Frazier-Lemke Act. W. B. Worthen Co. *v.* Kavanaugh, 295 U. S., page 56. There we said:
>
> "'With studied indifference to the interests of the mortgagee or to his appropriate protection they have taken from the mortgage the quality of an acceptable investment for a rational investor'; and, 'So viewed they are seen to be an oppressive and unecessary destruction of nearly all the incidents that give attractiveness and value to collateral security.'"

And, again, on page 581 of the opinion in the *Radford* case:

> "Statutes for the relief of mortgagors, when applied to pre-existing mortgages, have given rise, from time to time, to serious constitutional questions. The statutes were sustained by this Court when, as in Home Building and Loan Association *v.* Blaisdell, 290 U. S. 398, they were found to preserve substantially the right of the mortgagee to obtain, through application of the security, payment of the indebtedness. They were stricken down, as in W. B. Worthen Co. *v.* Kavanaugh, 295 U. S. 56, when it appeared that this substantive right was substantially abridged. Compare W. B. Worthen Co. *v.* Thomas, 292 U. S. 426."

Yet, again, in the *Radford* case (295 U. S. 597), the Supreme Court says:

> "Home Building & Loan Assn. *v.* Blaisdell, 290 U. S. 398, upon which Radford relies, lends no support to his contention. There the statute left the period of the extension of the right of redemption to be determined by the court within the maximum limit of two years. Even after the period had been decided upon, it could, as was pointed out, 'be reduced by order of the court under the statute, in case of a change in circumstances, * * *' (p. 447); and at the close of the period, the mortgagee was free to apply the mortgaged property to the satisfaction of the mortgage debt. Here, the option and the possession would continue although the emergency which is relied upon as justifying the Act ended before November 30, 1939."

It seems incontrovertible from a studied consideration and comparison of the opinions in the three above cited cases, namely, the *Blaisdell* case, involving the Minnesota statute, the *Kavanaugh* case, involving the Arkansas statute, and the *Radford* case, involving the original Frazier-Lemke Act, that clear cut rules of law emerge fully sanctioned by our Highest Court. These rules are very simple and easily understood. They are:

(1) That economic emergencies, while not creating constitutional power, may furnish occasion for the exercise of constitutional power already possessed.

(2) That a reasonable moratorium modifying a creditor's remedy, without impairing the creditor's substantial rights, is constitutional.

(3) That a statute or an act of Congress which takes valuable rights in specific property from one person and arbitrarily and without due process of law gives such property rights to another person, is unconstitutional.

It seems to us transparently clear that the amended Frazier-Lemke Act falls within the principles announced in the case of *Home Building & Loan Assn.* v. *Blaisdell,* 290 U. S. 398, and not within the principles laid down in the *Kavanaugh* and *Radford* cases, *supra;* and that, therefore, the present Subsection (s) of Section 75 of the National Bankruptcy Act is constitutional.

A recent decision of the United States Supreme Court which, we think, has a very logical and controlling bearing upon the case at bar is the case, or, to be more accurate, the cases (Nos. 479 to 490, inclusive, October Term, 1934) of *Continental Illinois National Bank & Trust Co. of Chicago,* and related cases v. *The Chicago, Rock Island & Pacific Railway Co. et al.,* decided April 1, 1935. 294 U. S. 648.

This proceeding was under Section 77 of the National Bankruptcy Act. This section may be regarded as a companion piece to Subsection (s) of Section 75 of the Bankruptcy Act, both Acts having been born of the depression; Section 77 having been designed to give relief to railroad corporations similar, with appropriate adaptations, to the relief which Subsection (s) of Section 75 furnishes to financially distressed farmers.

With the opinion in these cases may be found a marginal quotation of "various excerpts from Sec. 77," as the learned co' t puts it. One has only to read the text of Section 77 to see that it permits, not only a moratorium of the most far reaching sort as to the enforcement of lien or other debts against the petitioning railroad corporation, but that it, in addition, permits the most radical readjustment of the railroad's indebtedness imaginable, without regard to the effect of such readjustment upon particular lien obligations which might claim protection under the Fifth Amendment and those other constitutional provisions commonly invoked—and all this with regard only to the preser-

vation from destruction, by foreclosure, of the railroad's properties under economic conditions which demanded legislative authority to the courts to intervene in the interest of society at large.

And this radical legislation the learned Supreme Court, in these cases of *Continental Illinois National Bank & Trust Co. et al.*, v. *Chicago, Rock Island & Pacific Railway Co.*, justified under the bankruptcy clause of the Constitution, the same clause which petitioner invokes in the instant case.

Let us illustrate the broad and radical provisions of Section 77 by the following quotation from page 661 of the court's opinion:

> "By the Act of March 3, 1933, c. 204, 47 Stat. 1467 original jurisdiction, in addition to that theretofore exercised in voluntary and involuntary proceedings to adjudge persons bankrupt, was conferred upon courts of bankruptcy 'in proceedings for the relief of debtors', as provided in Sections 74, 75 and 77 of the act. We are here concerned only with Section 77. That section contains provisions for the reorganization of railroads engaged in interstate commerce. It permits any railroad corporation which is insolvent or unable to met its debts as they mature to effect a plan of reorganization.
>
> "It provides for the filing of a petition by the railroad corporation in a court designated by the act. If the petition be approved, the court, during the pendency of the proceedings, is given exclusive jurisdiction of the debtor and its property wherever located. The act requires that the railroad corporation shall be referred to in the proceedings as a 'debtor,' and permits any corporation, the majority of the capital stock of which is owned, or substantially all of whose properties are operated, by the debtor under lease or operating agreement, also to file a petition in the same proceeding stating that it is insolvent or unable to meet its debts as they mature and that it desires to effect a plan

of reorganization in connection with the plan of the original debtor.

"Other provisions of the section direct that a plan of reorganization shall include a proposal to modify or alter the rights of creditors generally or of any class of them, secured or unsecured, either through the issuance of new securities or otherwise; that it shall provide adequate means for its execution; that the term 'creditor' includes 'all holders of claims, interests, or securities of whatever character against the debtor or its property'; and that, if the plan is not proposed or accepted or confirmed within a reasonable time to be fixed by the judge, he may dismiss the proceeding."

The court in the case now under consideration took occasion, *sua sponte*, to expound the history and the true meaning of the bankruptcy clause of the Constitution that has such intimate relation to our case as to justify liberal quotations from the opinion. First we quote from page 667, 294 U. S., as follows:

"First. The constitutional validity of the section in its general scope and application is not assailed, the subject being passed without discussion by any of the parties. Nevertheless, grave doubt has been expressed in respect of that question; and since the question is inherently fundamental, we deem it necessary to consider and dispose of it in limine—postponing, however, for later consideration the limited contention of the banks, in which the Reconstruction Finance Corporation seems not to join, that the due process clause of the Constitution is infringed by the special application made of Section 77 in respect of the injunction.

"Article I, sec. 8, cl. 4, of the federal Constitution vests Congress with the power 'to establish * * * uniform laws on the subject of bankruptcies throughout the United States'; and the simple question is—does Section 77 constitute a law on the subject of bankruptcies? * * * From the beginning, the tendency of legislation and of judicial interpretation has been uniformly in the direction of progressive liberaliza-

tion in respect of the operation of the bankruptcy power."

And again we quote from page 671 of this same opinion:

"By the act of 1867, as amended by the act of 1874, c. 390, Section 17, 18 Stat. 178, 182, the debtor for the first time was permitted, either before or after an adjudication in bankruptcy, to propose terms of composition to his creditors to become binding upon their acceptance by a designated majority and confirmation by the judge.

"The fundamental and radically progressive nature of these extensions becomes apparent upon their mere statement; but all have been judicially approved or accepted as falling within the power conferred by the bankruptcy clause of the Constitution. Taken altogether, they demonstrate in a very striking way the capacity of the bankruptcy clause to meet new conditions as they have been disclosed as a result of the tremendous growth of business and development of human activities from 1800 to the present day. And these acts, far-reaching though they be, have not gone beyond the limit of congressional power; but rather have constituted extensions into a field whose boundaries may not yet be fully revealed.

"Section 77 advances another step in the direction of liberalizing the law on the subject of bankruptcies. * * * Equity receiverships, resorted to for that purpose, have never been satisfactory for many reasons. Partly, no doubt, in recognition of that situation, Congress, by Section 77, added railroad corporations to the category of those who might have relief by legislation passed in virtue of the bankruptcy clause of the Constitution; and determined, after consideration, that such relief to be effectual should take the form of a reorganization, and should extend to cases where the corporation is 'unable to meet its debts as they mature'. The last phrase, since it is used as an alternative for the word 'insolvent', obviously means something less than a condition of 'bankruptcy' or 'in-

solvency' as those words are employed in the law. See Bankruptcy Act, Section 1 (15), which defines an 'insolvent' as one whose assets, at a fair valuation, are not sufficient to pay his debts. It may be construed to include a debtor who, although unable to pay promptly, may be able to pay if time to do so be sufficiently extended. Obviously, Section 77 does no more than follow the line of historical and progressive development projected by previous acts.

"* * * (page 673) The same view sustains the validity of Section 77. Both contemplate an adjustment of a failing debtor's obligations; and although actual bankruptcy may not supervene in either, they are none the less laws on the subject of bankruptcies. With due regard for consistency, the constitutional validity of the one cannot well be sustained and that of the other denied, as this court quite evidently recognized in Canada Southern R. Co. *v.* Gebhard, 109 U. S. 527."

"It follows, from what has now been said, that Section 77, in its general scope and aim, is within the power conferred by the bankruptcy clause of the Constitution; and we so hold."

A further important principle which bears upon our case was adjudicated in the case now under discussion, namely:

"IF A FEDERAL COURT OF EQUITY MAY BY INJUNCTION STAY A FORECLOSURE, WHY MAY NOT A BANKRUPTCY COURT OF EQUITY STAY A SALE BY MORATORIUM UNDER AN ACT OF CONGRESS?

We are still discussing this case of the *Continental Illinois National Bank & Trust Co.* v. *Chicago, Rock Island and Pacific Railway Co.*, 294 U. S. 648.

In that case it was sought to foreclose, or sell, certain collateral securities. In the opinion of the Court, page 675, the following question is asked:

"Under Section 77 does the bankruptcy court have authority to enjoin the sale of the collateral here in

> question if a sale would so hinder, obstruct and delay the preparation and consummation of a plan of reorganization as probably to prevent it?"

The principle brought up by this judicial inquiry is, we submit, in essence very similar to the principle involved in the amended Frazier-Lemke Act, that is, whether a court of bankruptcy has the constitutional power under Sub-section (s) of Section 75 of the Bankruptcy Act to grant a moratorium. What difference is there in essence between the right of a court of equity, acting as a bankruptcy court, to enjoin the sale of collateral securities, and the right of a court of bankruptcy, acting not only as a court of original equity jurisdiction, but acting under the express authority of an Act of Congress, to stay the sale of real property sought to be foreclosed under a mortgage? In each case the proceeding is sought to be had under an agreement whereby the debtor has agreed, upon his default in the payment of the debt, that his property may be foreclosed, or sold, pursuant to the terms of the particular written instrument. The written instrument may be a collateral note, or a collateral agreement, or it may be a deed of trust. But the principle is the same in each case, and the principle in each case involves the right or the power of a court of equity to stay foreclosure proceedings.

In the above mentioned case of the *Continental Illinois National Bank & Trust Co.* v. *Chicago, Rock Island and Pacific Railway Co.*, the Supreme Court upheld the jurisdiction of a bankruptcy court to enjoin the sale of collateral securities for the reason that such sale might interfere with the consummation of a plan for the reorganization of the railroad under the provisions of Section 77 of the National Bankruptcy Act. Let us quote pertinent parts of the opinion, page 676:

> "The bankruptcy court, in granting the injunction, was well within its power, either as a virtual court of

equity, or under the broad provisions of Section 2 (15) of the Bankruptcy Act or of Section 262 of the Judicial Code.

"The injunction does not infringe Section 67 (d), U. S. C. Title 11, Section 107 (d). The substance of that provision is that bona fide liens shall not be affected by anything contained in the Bankruptcy Act. The injunction here in no way impairs the lien, or disturbs the preferred rank of the pledgees. It does no more than suspend the enforcement of the lien by a sale of the collateral pending further action. It may be, as suggested, that during the period of restraint the collateral will decline in value; but the same may be said in respect of an injunction against the sale of real estate upon foreclosure of a mortgage; and such an injunction may issue in an ordinary proceeding in bankruptcy. Straton *v.* New, 283 U. S. 318, 321, and cases cited. A claim that injurious consequences will result to the pledgee or the mortgagee may not, of course, be disregarded by the district court; but it presents a question addressed not to the power of the court but to its discretion—a matter not subject to the interference of an appellate court unless such discretion be improvidently exercised. So far as constitutional power is concerned, there is no difference between an injunction restraining the enforcement of a real-estate mortgage and one restraining the enforcement of a pledge by the sale of collateral security. Such differences as exist affect not the power but the propriety of its exercise—that is to say, the discretion of the court. Such an injunction, as just indicated, is within the contemplation of Section 77, and we need not inquire whether it would be admissible under the act in force prior to the adoption of that section."

And again, we quote from page 680 of the opinion in this case:

"We find no substance in the contention of the petitioning banks that Section 77, as applied by the court below to permit an injunction restraining the sale of

the collateral, violates the Fifth Amendment. The basis of the contention is that since, by the terms of the pledge, the pledgors are empowered on default to sell the collateral at such times as they may select. Section 77, as thus applied, deprives them of their property—that is to say, impairs or destroys their contractual rights—without due process of law. * * * Speaking generally, it may be said that Congress, while without power to impair the obligation of contracts by laws acting directly and independently to that end, undeniably, has authority to pass legislation pertinent to any of the powers conferred by the Constitution however it may operate collaterally or incidentally to impair or destroy the obligation of private contracts. Legal Tender Cases, supra; Louisville & Nashville R. R. *v.* Mottley, 219 U. S. 467, 480-482, 484; Highland *v.* Russell Car Co., 279 U. S. 253, 261. And under the express power to pass uniform laws on the subject of bankruptcies, the legislation is valid though drawn with the direct aim and effect of relieving insolvent persons in whole or in part from the payment of their debts. See Hanover National Bank *v.* Moyses, *supra,* at p. 188. So much necessarily results from the nature of the power, and this must have been within the contemplation of the framers of the Constitution when the power was granted.

"The injunction here goes no further than to delay the enforcement of the contract. It affects only the remedy. As already appears, this court has upheld the power of a court of bankruptcy to stay the enforcement of the remedy under a real-estate mortgage; and the remedy under a pledge, so far as constitutional power is here concerned, presents a situation strictly analogous in character."

We are unable to perceive why all of the foregoing reasoning does not apply with equal force to the provisions of Subsection (s) of Section 75. And, indeed, with greater force, because, as we have before suggested, Subsection (s) of Section 75 adds to the equity jurisdiction under the

Bankruptcy Act the express mandate of an Act of Congress.

From this outlook upon the law we proceed to the question above propounded, namely: Has the Congress, in revising the new Frazier-Lemke Act, brought the Act within the law as declared by the Supreme Court? In other words:

Whether the amended Frazier-Lemke Act meets and mends the objections of the United States Supreme Court in declaring unconstitutional the original Frazier-Lemke Act.

The answer to this question involves other inquiries.

(1)

IN WHAT RESPECT WAS THE ORIGINAL FRAZIER-LEMKE ACT HELD UNCONSTITUTIONAL?

It seems that the gist of the vulnerability of the original ubsection (s) resided in Paragraph seven (7) thereof, hich paragraph we quote:

> "(7) If any secured creditor of the debtor, affected thereby, shall file written objections to the manner of payments and distribution of debtor's property as herein provided for, then the court, after having set aside the debtor's exemptions as prescribed by the State law, shall stay all proceedings for a period of five years, during which five years the debtor shall retain possession of all or any part of his property, under the control of the court, provided he pays a reasonable rental annually for that part of the property of which he retains possession; the first payment of such rental to be made within six months of the date of the order staying proceedings, such rental to be distributed among the secured and unsecured creditors, as their interests may appear, under the provisions of this Act. At the end of five years, or prior thereto, the debtor may pay into court the appraised price of

the property of which he retains possession: *Provided,* That upon request of any lienholder on real estate the court shall cause a reappraisal of such real estate and the debtor may then pay the reappraised price, if acceptable to the lien holder, into the court, otherwise the original appraisal price shall be paid into court and thereupon the court shall, by an order, turn over full possession and title of said property to the debtor and he may apply for his discharge as provided for by this Act; *Provided,* however, That the provisions of this Act shall apply only to debts existing at the time this Act becomes effective.

"If the debtor fails to comply with the provisions of this subsection the court may order the trustee to sell the property as provided in this Act."

THE SUPREME COURT'S CRITICISM OF PARAGRAPH (7) OF THE ORIGINAL FRAZIER-LEMKE ACT.

We quote the concluding sentences from the learned Supreme Court's opinion in the *Radford* case by way of stating the essence of the Court's criticism of Paragraph (7), and the basis of the Court's decision:

"The province of the Court is limited to deciding whether the Frazier-Lemke Act as applied has taken from the Bank without compensation, and given to Radford, rights in specific property which are of substantial value. Compare Ochoa *v.* Hernandez, 230 U. S. 139, 161; Loan Association *v.* Topeka, 20 Wall. 655, 662, 664; In re Dillard, Fed. Cas. No. 3,912, p. 706. As we conclude that the Act as applied has done so, we must hold it void. For the Fifth Amendment commands that, however great the Nation's need, private property shall not be thus taken even for a wholly public use without just compensation. If the public interest requires, and permits, the taking of property of individual mortgagees, resort must be had to proceedings by eminent domain; so that, through taxation, the burden of the relief afforded in the public interest may be borne by the public."

(2)

WHAT ARE THE PROVISIONS OF THE FIFTH AMENDMENT?

The part of the Fifth Amendment here involved is:

> "Nor shall * * * (any person) be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation."

(3)

IN WHAT WAY DOES THE AMENDED SUBSECTION (s), THE NEW FRAZIER-LEMKE MORATORIUM ACT, DEPRIVE ANY PERSON OF HIS PROPERTY WITHOUT DUE PROCESS OF LAW, AND THUS CONTRAVENE THE FIFTH AMENDMENT?

There can be no comparison of the language of the original Paragraph (7) of Subsection (s) with the language of the amended Subsection (s), for the reason that there is no Paragraph (7) in the amended Subsection (s). There are only six paragraphs in the amendment. But the whole of the original Subsection (s) has been amended, and with a manifest purpose on the part of Congress to throw about the vested property rights of the creditor every constitutional safeguard to which such creditor might be entitled under the *Radford* decision.

Let us see if Congress has accomplished what it set out to do, that is, in good faith to meet the letter and the spirit of the decision of the highest tribunal of the Federal judicial system. We now enumerate:

1. The first paragraph of Subsection (s) provides, as formerly, for an appraisal of the debtor's property, upon failure to effect a composition or extension. But the creditor is expressly given the right to except to the appraisal, and to appeal therefrom within four months.

2. Paragraph (1) also provides that the debtor shall have possession of the appraised property, "under the supervision and control of the court". But Paragraph (1) further provides:

> "All such existing mortgages, liens, pledges, or encumbrances shall remain in full force and effect, and the property covered by such mortgages, liens, pledges, or encumbrances shall be subject to the payment of the claims of the secured creditors, as their interests may appear."

3. Paragraph (2) provides for a three-year moratorium, the debtor to retain possession of the property during this period, but "*in the custody and under the supervision and control of the court*", and with the added proviso that he shall pay a reasonable rental for the property, which rental shall be "*the usual customary rental in the community where the property is located,* based upon the rental value, not income and earning capacity of the property".

And this further provision in the new Act is of special significance:

> "*The Court, in its discretion, if it deems it necessary to protect the creditors from loss by the estate, and/or to conserve the security, * * * may, in addition to the rental, require payments on the principal due and owing by the debtor to the secured, or unsecured creditors, as their interests may appear,*" etc.

We have italicized certain words in Paragraph (2), in particular the last quoted words, in order to bring out their transcendent bearing upon the spirit of protection afforded the creditor in this Amended Act. The provision whereby the court may require payments on account of principal, in addition to the rental, absolutely assures the creditor that his investment will be safeguarded as far as may be humanly possible in the sound discretion of the court of equity.

Could any creditor reasonably ask more? Could any law reasonably provide for more?

4. Paragraph (3) provides that at the end of three years the debtor may pay into court a sum equal to the appraised value of the land, subject to credits; but

(a) Any creditor, secured or unsecured, or the Court of its own motion, may, after hearing evidence, order a reappraisal; or, after a hearing, the court may itself fix the value of the property, whereupon the debtor shall pay the value thus arrived at; and

(b) Further, it is provided that "upon request in writing by any secured creditor or creditors, the court shall order the property upon which such secured creditors have a lien to be sold at public auction"—and further, the court may order a sale if the "debtor at any time fails to comply with the provisions of this section, or with any orders of the court made pursuant to this section, or is unable to refinance himself within three years."

5. And, finally, Paragraph (6) provides:

> "(6) This Act is hereby declared to be an emergency measure and if in the judgment of the court such emergency ceased to exist in its locality, then the court, in its discretion, may shorten the stay of proceedings herein provided for and proceed to liquidate the estate."

DOES THE CONSTITUTION OFFER NO PROTECTION TO A DEBTOR?

This question has a pertinent and a solemn relationship to the foregoing analyses which we have undertaken to make of the *Radford* case and of the amended Act designed, if we may use the term, to synchronize the statute law with the law as declared by the learned Supreme Court.

Let us meet the question propounded in the caption without evasion. That we may make answer to this question in

its relation to the precise issue under discussion let us take soundings that we may know to what point we have come in our discussion.

We submit that our analysis of the Amended Frazier-Lemke Act presents this Act as potentially a mere moratorium act, a stay law designed to enable the financially distressed farmer, beset by economic forces which have, without his fault or contriving, and with a universal sweep, evaporated the value of his land, of the products of his farm, of his live stock, of his all, driving him into bankruptcy, to have a breathing spell, to have the opportunity to recoup his losses in a hoped-for period of reacting values, to the end that he may retain his home, a shelter for his family—at least until, if the worse comes to the worst, he may make new adjustments in life.

Our position, stated precisely as we conceive it, is that this Amended Act, in the efforts of its framers to assure its constitutionality, has in it far more of protection for the creditors than it has for the debtor. The utmost that it does for the farmer debtor is to grant to him a three-year moratorium. But even this concession is subject either to modification by the court or to veto by the creditor.

Let us explain. If the debtor is granted a three-year moratorium, here is what may happen to him at any time during the three years:

(a) His property may be sold at any time during the moratorium if he defaults in performing any of the conditions laid upon him by the court.

(b) He may be called upon by his creditors to face a new appraisal if the first appraisal is deemed too low in amount.

(c) He must pay a reasonable rental for his farm during this three-year term.

(d) He must make payments on the principal debt, in addition to his rental, if the creditors so demand, and the court shall so decree.

(e) At the termination of his period of moratorium his creditors may call for a new appraisal and the debtor must settle on the basis of such appraisal or stand eviction.

(f) And, finally, at any time, the court may decree that the emergency has ceased upon which the three-year moratorium was granted—and "proceed to liquidate the estate".

We do not speak lightly, but literally, when we say that one has but to analyze this so-called moratorium Act to discover that in it, so far from violating the "vested rights" of the creditor, the farmer has been granted no absolute right at all. The Act does not even guarantee him a moratorium. It positively gives him nothing, for in every instance it gives with one hand and takes away with the other.

If the Act gives him three years' stay in one paragraph, in another it permits the court to take it away. If the Act provides for a rental in one paragraph, it provides in the same paragraph that the court may require payments on the principal debt at any time. And if in one paragraph it provides for an appraisal as a basis for purchase and for rental, in another paragraph it provides for a new appraisal at the request of creditors when the time for settlement comes; or the court may at such time of its own motion fix a new value. And, finally, at the request of a secured creditor the court may, after all, order that the property be sold at public auction, whereupon the debtor, thus battle-doored and shuttle-cocked around by this wild-eyed, long-haired Act, as many would have us regard it, may be required to redeem it at the auction price, with five per cent interest.

In other words, we deliberately contend that the utmost, in last analysis, that the farmer-debtor gets out of this

much-berated Act is to be put, to employ a phrase used in simpler and better days than these, "on praying ground and pleading terms" with a court of equity. For, verily, this entire Amended Act confers not one vested right, not one arbitrary remedy, upon the farmer. It merely gives him the right to throw himself upon the conscience of a court of equity as his shelter in this time of storm.

And, again, we point out that this so-called unconstitutional Act does not even confer upon a bankruptcy court, which is a court of equity, as much discretion or authority as that same court has in its own inherent equity jurisdiction in cases of railroad receiverships. For illustration, in the *Seaboard Air Line Receivership* case a Virginia Federal Court has not only stayed proceedings for six years (so far), but has decreed the issuance of $15,000,000 of Receivers' Certificates, and has demoted many first mortgages to the status of second mortgages, in order that these Receivers' Certificates might have priority. It seems inconsistent that this long established jurisdiction which has grown up in Federal courts, without statutory origin or authority, should go unquestioned, while under the broad authority of the bankruptcy clause an Act of Congress, less radical than the power long exercised by courts, should be challenged as unconstitutional.

We put this question to those who put the present Act under the ban for unconstitutionality:

Assuming, and this we assert, that there is not one right given, or concession made, to the farmer in this Act which either may not be vetoed by the lien creditors or by them submitted to the Court for judicial determination, upon what ground can it be claimed that the Act contravenes the Fifth Amendment to the Federal Constitution? The Fifth Amendment assures the citizen that he shall not be deprived of his property without due process of law.

Is not every so-called right accorded the debtor subject to challenge by the lien creditor? May he not invoke a judicial determination of every concession made to the debtor? If then the creditor is assured his day in court on every right accorded the debtor, how can the creditor claim lack of due process?

And, if the Fifth Amendment be invoked to assure the lien creditor that he shall not be deprived of his vested property rights by reason of his mortgage, how is he hurt here? For may not the creditor first call for a termination of the moratorium on the ground that the emergency has passed? And may he not then call for a foreclosure by sale at public auction? We ask again, how is the creditor hurt?

No one will deny that under the Bankruptcy Act a debtor owing one hundred thousand dollars, and owning only two thousand dollars in assets, may, in Virginia, have all his property set aside as his homestead exemption and yet be discharged from all his debts. If an Act of Congress can permit this under the bankruptcy clause of the Constitution, why may not an act be sustained which does not relieve a man of his debts, but merely gives him time within which to pay them?

Conclusion.

We have endeavored to demonstrate that the Amended Frazier-Lemke Act has in fact, as was the intention of its framers, brought the statute law in harmony with the spirit and the ruling found in the opinion of Mr. Justice Brandeis in the *Radford* case. The gist of the element of unconstitutionality of the first Act, as found in the *Radford* case, was, as we see it, not that the first Act granted a moratorium, but that it denied to the mortgagee his right in the specific property, that it denied him the right to call for a sale of the property and to become a bidder at such sale, and that the Act, further, tied the hands of the court

so that its discretion could not be exercised for the protection of the trust subject.

We think it clear that the Supreme Court did not intend to deny to Congress the power under the bankruptcy clause of the Constitution to declare a moratorium in favor of distressed debtors during the period of the depression, provided care was taken to give judicial protection to the rights of the creditor in the specific property.

And we submit that the spirit and intent of the Radford decision has been met by the Amended Frazier-Lemke Act. We further submit that, in order to bring into harmony the law upon this subject the *Radford* case must be read in connection with the *Blaisdell* case and the case of the *Continental Ill. Nat'l Bank & Trust Co.* v. *Chicago, Rock Island and Pacific Ry. Co.*, both of which last named cases are cited in the opinion of Mr. Justice Brandeis in the *Radford* case.

And, finally, we submit that these three cases together present in clear outline the compass of the law, and that the Amended Frazier-Lemke Act does not contravene the law as thus proclaimed by the Honorable Supreme Court of the United States, but that it presents a sound, a salutary, and a harmonious application of the law to the case of the farmer in financial distress.

And petitioner submits that the failure of the learned Circuit Court of Appeals for the Fourth Circuit to sustain this Act is reversible error.

Respectfully,

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APPENDIX.

The following cases support the constitutionality of the amended Frazier-Lemke Act:

Dallas Joint Stock Land Bank v. *Davis* (5th Circuit C. C. A.), May 5, 1936, paragraph 3999, Bankruptcy Law Service;

In re Loop, Western District, Pennsylvania, May 1, 1936, Bankruptcy Law Service, paragraph 4001;

In re Slaughter, Northern District, Texas, 12 Fed. Supp. 206, Bankruptcy Law Service, paragraph 3621;

In re Reichert, Western District, Kentucky, 13 Fed. Supp. 1, Bankruptcy Law Service, paragraph 3777;

In re Bennett, Western District, Missouri, 13 Fed. Supp. 353, Bankruptcy Law Service, paragraph 3814;

In re Cole, Southern District, Ohio, 13 Fed. Supp. 283, Bankruptcy Law Service, paragraph 3813;

In re Williams, Northern District, Tennessee, Bankruptcy Law Service, paragraph 3705;

In re Allison, Eastern District, Illinois, Bankruptcy Law Service, paragraph 3876;

In re McCune, Western District, Pennsylvania, Bankruptcy Law Service, paragraph 3887;

In re Chilton, U. S. District Court Colorado, Bankruptcy Law Service, paragraph 4185.

In the opinion in *Dallas Joint Stock Land Bank* v. *Davis,* 5th C. C. A., Bankruptcy Law Service, paragraph 3999, Circuit Judge Hutcheson said: "Both committees (Senate and House Judiciary Committees) in recommending the bill for passage declared that the new subsection had been written so as to conform to the decision of the Supreme Court and that they felt that it did conform. We think it not a strained construction to hold that it does.

"On its face the Act merely transfers the liquidation of the indebtedness from State courts to the court of bankruptcy. It remits to the judicial discretion of that court the administration of the property of a bankrupt, with the end in view to bring about, if a due regard for the property rights and interests of his creditors permits it, a gradual and therefore more just and equitable liquidation, in lieu of an unduly hasty and forced one."

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FEB 5 1937

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 530

ROBERT PAGE WRIGHT, BANKRUPT,
Petitioner,

vs.

VINTON BRANCH OF THE MOUNTAIN TRUST BANK OF ROANOKE, VIRGINIA, AND A. C. HARRIS, TRUSTEE.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF ON BEHALF OF ROBERT PAGE WRIGHT.

WILLIAM LEMKE,
S. S. LAMBETH, JR.,
WILLIAM LEMKE, JR.,
ELMER MCCLAIN,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 530

ROBERT PAGE WRIGHT, BANKRUPT,
Petitioner,
vs.
VINTON BRANCH OF THE MOUNTAIN TRUST BANK OF ROANOKE, VIRGINIA, AND A. C. HARRIS, TRUSTEE.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF ON BEHALF OF ROBERT PAGE WRIGHT.

Opinion Below.

Robert Page Wright *vs.* Vinton Branch of the Mountain Trust Bank of Roanoke, Virginia, and A. C. Harris, Trustee. Order to dismiss without opinion (D. C., W. D. Va.) [R. 10-11]. Opinion of Circuit Court of Appeals of 4th Circuit, 85 F. (2d) 973 (C. C. A. 4th) [R. 16-22].

Jurisdiction.

Certiorari was granted on December 21, 1936, under Judicial Code, Section 240 (a), as amended by the Act of February 13, 1925.

Question Presented.

The only question presented is the constitutionality of subsection (s), known as the Frazier-Lemke Act of August 28, 1935 [49 Stat. 942], 11 U. S. C. Supp. 1, 203 (s), which was added as an amendment to Section 75 of the Bankruptcy Act [47 Stat. 1470] after the Supreme Court held the original Frazier-Lemke Act of June 28, 1934 [48 Stat. 1289] unconstitutional.

The sole question here involved is whether the new subsection (s) is in violation of the "due process" clause of the Fifth Amendment. This new subsection (s) was enacted by Congress with a view of complying with the provisions set forth in the Supreme Court's opinion holding the old subsection (s) unconstitutional. We feel that the new subsection (s) conforms to the opinion of the Supreme Court and is constitutional.

Summary of Argument.

I. The new Frazier-Lemke Act is an Act of Congress based on Congress' constitutional power to enact laws on the subject of bankruptcies. It is the result of a painstaking attempt by Congress to comply with the decision of this Court holding the first Frazier-Lemke Act unconstitutional.

II. The new Frazier-Lemke Act has made careful provision for the protection of all property rights of creditors. In no respect does it go beyond the boundaries already marked out as being within due process of law. In most respects the new Act is not nearly so drastic as Sections 77 and 77b of the Bankruptcy Act.

III. The new Frazier-Lemke Act is a reasonable exertion of a power expressly delegated to the Congress of the United States. This power is one granted exclusively to Congress. Any legislation enacted under this power there-

fore overrides all conflicting state laws and even state constitutions.

IV. When exercising the bankruptcy power Congress may make provision for rehabilitation of the debtor as well as for protection of creditors. It may stay court proceedings for a reasonable period. It may permit the bankrupt to remain in possession during the stay. It may allow the bankrupt to repurchase the property involved.

Statute Involved.

The statute involved is set forth in Appendix A (p. 76, *infra*).

On March 3, 1933, Section 75 of the Bankruptcy Act entitled "Agricultural Compositions and Extensions" was enacted. On June 28, 1934 Section 75 was amended by the addition of the Frazier-Lemke Act [Section 75 (s)]. This act was held unconstitutional by this Court. On August 28, 1935, the new subsection (s), here in question, was enacted.

Differences Between Old and New Acts.

While the new subsection (s) has for its object and purpose the conservation and preservation of agriculture, the same as the old subsection (s), yet the methods and means employed are essentially different. The old act provided for a private sale of the security direct to the mortgagor. The present act provides for a judicial public sale at which the mortgage holder may bid.

The old subsection (s) gave an extension of time of five years. The new Act gives an extension of time of three years.

The old subsection (s) created a general lien subject to and inferior to all prior liens or encumbrances. The new subsection (s) expressly provides that all existing mortgages, liens and encumbrances shall remain in full force

and effect and the property covered by such mortgages, liens, pledges or encumbrances shall be subject to the claims of the secured creditors as their interests may appear.

The old Act provided for a sale by the trustee to the debtor of any part or all of the remainder of the bankrupt's estate after exemptions had been set aside upon payment of 1 per centum interest upon the appraised price within one year from the date of said sale and 2½ per centum of the appraised price for each of the next two years and 5 per centum of the appraised price for the following two years and the balance of the appraised price within six years, interest at the rate of 1 per centum. The new subsection (s) has no such provisions.

The old subsection (s) makes provisions for the debtor to dispose of part or parcel of his property. The new subsection (s) makes no such provision.

The old subsection (s) placed possession of the property in the farmer debtor under the control of the court. The new subsection (s) places the property in the custody and under the supervision and control of the court. *Under it the farmer debtor retains possession only as long as he complies with the orders of the court.*

Under the new subsection (s) the farmer debtor is entitled to retain possession, under the custody, control and supervision of the court, *as long as he complies with all the orders of the court and pays a reasonable rental, semi-annually, fixed by the court.* The first payment must be made within a year. The old subsection (s) contained no such provision.

The new subsection (s) provides further that the court, *if it deems it necessary to protect the creditors from loss and to conserve the property, may order sold, at public or private sale, any unexempt perishable property of the debtor or any unexempt personal property not reasonably neces-*

sary for farming operations. The old subsection (s) contained no such provision.

Again, under the new subsection (s) the court may, in addition to the rental, *require payments on the principal due and owing by the debtor to the secured or unsecured creditors and may order such payments to be made quarterly, semi-annually or annually.* The old subsection (s) contained no such provision.

Under the old subsection (s) the value of the property was fixed by appraisal. Under the new subsection (s) it is fixed by appraisal with the right of any creditor *to ask for re-appraisement or to ask that it be sold at public auction.*

Under the old subsection (s) there was no public sale and no provision under which the secured creditors could bid or buy the property. Under the new subsection (s) the secured creditor *may demand a public sale and bid at such sale and buy the property* providing he is the highest bidder. (48 Stat. 1289) and (49 Stat. 942).

It will be noted that the new law makes the following provisions for the protection of the creditor's interest:

1. The creditor may appeal from the appraisal.

2. Liens are preserved in full force and effect.

3. The property remaining in possession of the debtor is in the custody and under the supervision of the court.

4. The debtor must pay a reasonable rent semi-annually.

5. This rental is used to pay taxes and upkeep on the property.

6. The court may order perishable property or property not needed in farming sold.

7. The court may require payments on principal to be applied on the secured debt. The payment may be required quarterly, semi-annually, or annually.

8. The creditor may have a re-appraisal.

9. The creditor may have a judicial sale.

10. The creditor may bid at the sale.

11. If the debtor fails to comply with any provisions of the Act or any court order made thereunder or is unable to refinance himself, a trustee may be appointed and the property sold.

Statement of the Case.

This case is one of six cases brought under subsection (s) of Section 75 of the Bankruptcy Act (49 Stat. 942) known as the new Frazier-Lemke Act (R. 1 and 2).

The case was referred to the Conciliation Commissioner. A meeting of the creditors was called at which the debtor made a written proposal for extension of the time for payment of his debts, specially asking time for the marketing of valuable boxwood on his premises (R. 4, 5 and 6).

The Conciliation Commissioner reported to the District Court that the creditors declined to accept the debtor's proposal for extension and the learned District Court entered an order providing that the proceedings should be dismissed unless within fifteen days the debtor should file his petition praying to be adjudged a bankrupt under Section 75, Subsection (s), as amended by the Act of August 28, 1935 (R. 7 and 8).

Petitioner filed his amended petition under said last mentioned section, praying to be adjudged a bankrupt, and praying that he might have all the benefits of said section; and petitioner was by order of said District Court adjudged a bankrupt, and the case was referred back to the Conciliation Commissioner for proceedings under said Subsection (s) of Section 75 of the Bankruptcy Act, as amended (R. 8, 9 and 10).

The Vinton Branch of the Mountain Trust Bank having moved to dismiss the proceedings "upon the ground that

Subsection (s) of said Act is unconstitutional in that it deprives said creditor of its property without due process of law," by order entered January 8, 1936, the motion was granted, and the proceedings were terminated (R. 10 and 11).

From this order petitioner was allowed an appeal by the United States Circuit Court of Appeals for the Fourth Circuit April 6, 1936 (R. 14), on assignment of errors duly filed (R. 11 and 12). The case having been argued, the learned United States Circuit Court of Appeals for the Fourth Circuit in an opinion (set forth in full, R. 16, *et seq.*) affirmed the learned District Court's judgment holding the said Act unconstitutional, and entered its order accordingly (R. 22).

The Circuit Court also entered an order that the mandate in this and the five other cases be stayed pending an application for Writ of Certiorari to the Supreme Court (R. 22 and 23).

Petition for writ of certiorari was duly filed November 16, 1936, and the writ granted on December 21, 1936 (R. 23).

Robert Page Wright, bankrupt petitioner, is fifty-two years of age. He is a resident of the County of Bedford, in the Western District of the State of Virginia, residing on his farm situated about one-half mile from the village known as Old Stewartsville. He is a farmer owning and operating, subject to liens, a tract of land containing about fifty-nine acres. He is married and his wife, Gertie F. Wright, resides with him on the farm. They have four children, three of whom are over twenty-one years of age. Two of the children reside with the petitioner, who for three years has been incapacitated for active work for the reason of invalidism—heart affliction.

Petitioner is unable to meet his debts as they mature. He believes his real estate would, under normal economic con-

ditions, be worth substantially more than the amount of his obligations, but under the existing conditions would bring substantially less than his obligations, and he is insolvent. Therefore, on March 29, 1935, he filed his petition for composition or an extension of time with the District Court, pursuant to the provisions of Section 75 of the Bankruptcy Act (R. 1 and 2).

Petitioner's obligations, on March 29, 1935, amounted to $6,559.50 of which amount $5,797.80 are secured claims. He also sets forth in his schedule his estimate of the value of his property. This amounts to $2,822.50 of which $2,500.00 is real estate (R. 3 and 4).

There has been no appraisal of petitioner's property for the reason that the creditors refused to accept the proposal for a composition. In the proposal the petitioner assures the creditors that he has no desire to avoid the payment of his debts in full and asks for the cooperation of his creditors and especially that the first lien creditors cooperate with him in disposing of boxwood to be applied on his indebtedness. But the creditors refused the proposal (R. 5-7). Thereafter proceedings were taken as set forth above and the case is now before this court for final determination on the constitutionality of the new Subsection (s) of Section 75 of the Bankruptcy Act.

Summary History of New Frazier-Lemke Act.

Realizing that this Court has been exhaustively informed in a number of recent cases as to the history and development of Bankruptcy in the United States, no attempt will be made to reproduce such material here. See *Continental Ill. Nat. Bank and Trust Co.* v. *Chicago, Rock Island and Pacific Ry.*, 294 U. S. 648; *Louisville Joint Stock Land Bank* v. *Radford*, 295 U. S. 555; *Ashton* v. *Cameron County*, 298 U. S. 513.

When the Supreme Court held the original Frazier-Lemke Act unconstitutional in *Louisville Joint Stock Land Bank* v. *Radford,* 295 U. S. 555 (1935), the present act was introduced in both the Senate and the House. It was referred to the Judiciary Committees of the Senate and the House and both of these Committees referred it to Subcommittees for study and consideration with the purpose of complying with the court's decision.

The author of the bill was called in by both of the Subcommittees. The Act was then carefully considered sentence by sentence, section by section, with the decision of the Supreme Court so as to comply with that decision. Many changes were made by the Subcommittees.

After the Subcommittees had finished their work the bill was reintroduced with the changes and amendments made by the Subcommittees and then was brought up before the Committees of the Whole of both the Senate and the House. *There again the bill was gone over sentence by sentence, paragraph by paragraph and section by section, carefully considered and compared with the decision of the Supreme Court, and further amendments made.*

The bill was then brought up on the floor of the Senate and the House and further debated with a view of having it comply with the decision of the Supreme Court and was finally passed in its present form without a dissenting vote in either House. 49 Stat. 942, 11 U. S. C. 203 (s), Aug. 28, 1935.

The following quotations from the Congressional Record are indicative of the legislative discussion:

> Senator Copeland: "I wish to ask the Senator from Idaho (Sen. Borah): Is it his conviction that this bill in the form in which it is now presented to us is likely to run the gauntlet of the courts and to be declared valid legislation?"

Senator Borah: "It is my opinion that it will run the gauntlet of the courts. It is really nothing more now, if the senator please, than a bankruptcy bill. * * *"

Senator Copeland: "Did the senator take an opposite view regarding the original Frazier-Lemke Act?"

Senator Borah: "I opposed that measure here on the floor as the record will show."

Senator Copeland: "On constitutional grounds?"

Senator Borah: "For the reason that I thought it was unconstitutional." 79 Cong. Rec. 13662 (1935).

Senator Borah: "This bill undertakes to adapt the bankruptcy principles to the situation of the farmer. I venture to say that in principle the bill is no different than the acts under which multiple railroads have gone through bankruptcy, and where those creditors of whom the senator speaks have lost their 100 cents on the dollar. I see nothing in this bill which in principle has not been given to business, to municipal corporations and to all lines of industry." 79 Cong. Rec. 13637 (1935).

It is needless for us to suggest that a sincere attempt was made by the Judiciary Committees to have the act conform with the decision of the Supreme Court. There were eighteen lawyers on the Judiciary Committee of the Senate and twenty-six on the Committee of the House. Some of these lawyers have a national and international reputation. Some of them are among the leading constitutional lawyers of this nation.

Therefore, because of the importance of this case, because of the fact that it involves the right of Congress to legislate under a grant of power expressly given to it by the Constitution and because it involves the relative position of the judicial and legislative branches of our government, we feel the Court will bear with us, and give this case its most careful consideration.

We are not here concerned with the decision of the Supreme Court holding the original Frazier-Lemke Act un-

constitutional. This is not the same act, but a new act drafted carefully so as to comply with the mandate laid down by the Supreme Court in that decision. Although we may state in passing that while the decision of the Supreme Court was unanimous, *yet two United States Circuit Courts of Appeal, consisting of six judges, unanimously held it constitutional, and all but a few of the United States District Judges either accepted the Act as valid or gave oral or written opinions sustaining its constitutionality. The Attorney General's office, in an able and exhaustive opinion, also held it constitutional.* In addition we may state that some of our ablest constitutional lawyers agreed with our position that the original Frazier-Lemke Act was within the constitutional grant of power. From the above it is evident that there is dissenting legal and judicial opinion, even though the Supreme Court was unanimous. But, as stated above, this is not the original Frazier-Lemke Act. It is a new and entirely different Act.

Nothing Novel in Present Frazier-Lemke Amendment.

There is nothing unusual in the new Frazier-Lemke amendment. It simply applies well established principles of bankruptcy law to agriculture. This may appear novel, but there is no provision in the Frazier-Lemke amendment that the bankruptcy courts of this nation have not already made use of, in some cases.

The courts have allowed going concerns to remain in possession, and to continue in business under trustees, and without trustees. They have permitted possession and the payment of indebtedness of such concerns on the installment plan, with or without interest. *In re Reiman,* 7 Ben. 445, Fed. Cas. 11673; *Sparhawk* v. *Yerkes,* 142 U. S. 114; *In re Swofford Co.,* 180 Fed. 549; *Burlingham* v. *Crouse,* 228 U. S. 459.

The courts have scaled down indebtedness to less than the value of the property, through composition, and they have given extension of time in which payments were to be made; and this, at times, against the wishes of the minority. What can be done to a minority can be done to a majority, or all, secured or unsecured creditors, and still be constitutional. They have sold encumbered property, free of lien, and unencumbered property, for cash or on time. Referees in bankruptcy have sold encumbered and unencumbered property, at public and at private sales, at 75% of the appraised value without the approval of the court, and at less than 75% with the approval of the court; and on occasions, have sold it to the bankrupt. *In re Merkus*, 289 Fed. 732 (C. C. A. 2nd); *Traer* v. *Clews*, 115 U. S. 528.

"There is nothing new in selling mortgaged or encumbered property under the Bankruptcy Act. In fact, sales free of encumbrances were authorized by the statute of 1867. The present law has no such provision. The cases are quite uniform, however, in declaring that such sales can be authorized and by the referee as well as by the judge." *In re Waterloo Organ Co.*, 118 Fed. 904.

"The jurisdiction of the court does not depend upon the size of an estate or the size of a mortgage and a bankrupt, by making excessive mortgages, cannot defeat administration of his effects in bankruptcy." *Matter of Theiberg*, 47 Am. B. R. 257.

Again, "A clause in a mortgage giving the right to bid on bonds does not in any way limit the power of the court to order a sale free and clear from the mortgage lien, however much it may influence its discretion." *Matter of Franklin Brewing Co.*, 41 Am. B. R. 51.

"A sale of assets may be directed free of liens without regard to the objections of lienors provided such liens are amply protected by being transferred to the proceeds of the

sales." *Matter of Tube Co.*, 25 Am. B. R. 651. That is just what the Frazier-Lemke Act proposes to do. It proposes to wipe out the lien and to protect the lienholder by securing to him the proceeds of the sale.

"The effect of a sale, free of encumbrances, is to vest a purchaser with good title and to transfer all existing liens to the fund derived from the sale to which a lienholder must resort." *Shinn* v. *Kemp & Herbert et al.*, 73 Wash. 254, 131 Pac. 822.

"A bankruptcy court has power to sell a bankrupt's real property, free from encumbrances, and declare property liens to be liens on proceeds of sale, no matter whether liens are tax liens or not and such power is constitutional." *Van Huffel* v. *Harkelrode*, 284 U. S. 225.

The new Frazier-Lemke Act, Section 75(s) of the Bankruptcy Act of 1898, has been held constitutional in the following cases:

Dallas Joint Stock Land Bank v. *Davis* (5th Circuit, C. C. A.), May 5, 1936, paragraph 3999, Bankruptcy Law Service;

In re Loop, Western District, Pennsylvania, May 1, 1936, Bankruptcy Law Service, paragraph 4001;

In re Slaughter, Northern District, Texas, 12 Fed. Supp. 206, Bankruptcy Law Service, paragraph 3621;

In re Reichert, Western District, Kentucky, 13 Fed. Supp. 1, Bankruptcy Law Service, paragraph 3777;

In re Bennett, Western District, Missouri, 13 Fed. Supp. 353, Bankruptcy Law Service, paragraph 3814;

In re Cole, Southern District, Ohio, 13 Fed. Supp. 283, Bankruptcy Law Service, paragraph 3813;

In re Williams, Middle District, Tennessee, Bankruptcy Law Service, paragraph 3705;

In re Allison, Eastern District, Illinois, Bankruptcy Law Service, paragraph 3876;

In re McCune, Western District, Pennsylvania, Bankruptcy Law Service, paragraph 3887;

In re Chilton, U. S. D. Ct., Colorado, Bankruptcy Law Service, paragraph 4185;

In re McIntyre, Western District, Pennsylvania, Bankruptcy Law Service, paragraph 4365.

Former Decisions Not Stare Decisis.

When an act of Congress is held unconstitutional and then re-enacted by Congress, it comes before the Court as a new Act and is entitled to be considered as such. It has been so held even where the Act has been re-enacted with slight changes as well as where changes were made to comply with the decision.

Acts of Congress held to be unconstitutional as originally enacted have on several occasions been held constitutional when re-enacted in altered form with the design of meeting the Court's objections. Cf. *Hill* v. *Wallace,* 259 U. S. 44, and *Chicago Board of Trade* v. *Olson,* 262 U. S. 1 (*Grain Futures Acts*); *The Employers' Liability Cases,* 207 U. S. 463, and *Second Employers' Liability Cases,* 223 U. S. 1 (*Employers' Liability Acts*).

Proper respect for a coordinate branch of the government requires that the courts give a legislative act the most serious and exhaustive consideration before declaring it unconstitutional. *United States* v. *Harris,* 106 U. S. 629. The mere fact that an act introduces a new or novel method of procedure does not make it lacking in due process. *Hurtado* v. *California,* 110 U. S. 516. Neither does the fact that it involves an extension of existing legal doctrines. *Holden* v. *Hardy,* 169 U. S. 366.

It has been said: "that the doctrine of *stare decisis* can never be properly applied to decisions upon constitutional questions. However the Court may interpret the provisions of the Constitution, it is still the Constitution which is the

law and not the decision of the Court." 2 Warren, The Supreme Court in United States History (1926) 748-9. The duty of the Court is to square a new statute with the Constitution itself. *United States* v. *Butler*, 297 U. S. 1. A new act of Congress should be entitled to fresh consideration by the courts and to a new and separate comparison with the Constitution. As a new congressional enactment it seems that the new Act should be entitled to an analysis on its own merits standing apart from the defects found in the first Act.

In *Hertz* v. *Woodman*, 218 U. S. 205, 212, Mr. Justice Lurton said:

> "The rule of *stare decisis*, though one tending to consistency and uniformity of decision, is not inflexible. Whether or not it shall be followed or departed from is a question entirely within the discretion of the court, which is again called upon to consider a question once decided."

Again, in the case of *DiSanto* v. *Pennsylvania*, 273 U. S. 3, Mr. Justice Brandeis, in his dissenting opinion, said:

> "It is usually more important that a rule of law be settled, than that it be settled right. Even where the error in declaring the rule is a matter of serious concern, it is ordinarily better to seek correction by legislation. Often this is true although the question is a constitutional one. This is usually true so far as concerns a particular statute whether the error was made in construing it or in passing on its validity. *But the doctrine of stare decisis does not command that we err again when we have occasion to pass on a different statute.* In the search for truth through the slow process of inclusion and exclusion, involving trial and error, it behooves us to reject, as guides, the decisions upon such questions which prove to have been mistaken. * * *"

Again, quoting 2 Warren, the Supreme Court in *United States History*, 748-9:

> " 'Any citizen whose liberty or property is at stake has an absolute constitutional right to appear before the Court and challenge its interpretation of the Constitution, no matter how often they have been promulgated, upon the ground that they are repugnant to its provisions. * * * When the Bar of the country understand this, and respectfully but inexorably requires of the Supreme Court that it shall continually justify its decisions by the Constitution, and not by its own precedents, we shall gain a new conception of the power of our constitutional guaranties. * * * What we need is constant and unrelenting professional criticism of judicial opinions, and constant and unrelenting insistence that judicial errors of reasoning shall be judicially corrected.' Everett Abbott, Justice and the Modern Law (1913)."

Summary of Provisions of New Frazier-Lemke Act.

Subsections a-r of Section 75 as enacted Mar. 3, 1933, standing alone provided nothing but a temporary stay for the farmer-debtor during which he could negotiate with his creditor. We say creditor because in farm financing the first lien is almost always held by a single mortgage holder, who had the power to defeat any proposition submitted. It was found by experience that additional legislation was necessary to afford to the nation's largest industry the same opportunity to conserve security values that was provided for railroads and corporations.

The new subsection (s) of Section 75 of the Bankruptcy Act provides that any farmer-debtor who fails under subsections a-r of Section 75 to effect a composition with his creditors may amend his petition or answer asking to be adjudged a bankrupt. All the debtor's property wherever located is then to be appraised at its fair and reasonable

market value. His unencumbered exemptions are set aside to him.

The debtor is allowed to retain possession of any part or all of the remainder of his property for a period of three years under supervision and control of the court. *The debtor is required to pay a reasonable rental into court for the part of the property he retains.* This rental is to be applied first to pay taxes and upkeep of the property, and the remainder distributed among creditors, secured and unsecured, and applied on their claims as their interests may appear. *The court is given power to sell unexempt and perishable personal property if deemed necessary to protect the interests of creditors. The court may, if it sees fit, require payments on principal with a view to the debtor's ability to pay.*

After three years have elapsed, or sooner if he desires, the debtor may pay into court the amount of the appraisal of the property of which he has retained possession and the court will turn over to him full title to and possession of that property, free and clear of encumbrances. This procedure is subject to two provisos: 1. On the request of any creditor, secured or unsecured, or of the debtor, *the court may order a reappraisal of the property and require the debtor to pay that price.* 2. *On the demand of any secured creditor the court must order the property on which the creditor has a lien sold at public auction. If the debtor fails to comply with the provisions of the Act, or any court order made thereunder, a trustee may be appointed and the property sold as in other bankruptcy cases.*

New Frazier-Lemke Act is an Act on the Subject of Bankruptcies.

It has been claimed that the Frazier-Lemke Amendment is not a law on the subject of bankruptcies. But in view of the very broad definition given to the subject of bank-

ruptcies by the courts this objection seems untenable. See *In re Klein* (C. C. Mo.), reported in note to *Nelson* v. *Carland,* 1 Howard 265; *In re Reiman,* 7 Ben. 455, Fed. Cas. 11673; *Hanover Nat. Bank* v. *Moyses,* 186 U. S. 181; *Louisville Joint Stock Land Bank* v. *Radford,* 295 U. S. 555.

In re Chicago, Rock Island & Pacific Ry. Co. (7 C. C. A.), 72 F. (2d) 443, the court said:

> "Under the Federal Constitution, Congress 'is authorized to enact such bankruptcy legislation as it may deem wise and appropriate. The constitutional grant of authority is not conditional nor limited,' save as to uniformity."
>
> * * * * * * *
>
> "Congress, having the express authority to enact legislation on the subject matter of bankruptcy, was the sole judge of the means and their appropriateness to the purpose of the legislation so long as said means did no violence to the Constitution."

In *Continental Ill. National Bank and Trust Co.* v. *Chicago Rock Island & Pac. Ry.,* 294 U. S. 648, the Supreme Court held Section 77, the moratorium law for railroads, to be constitutional. Mr. Justice Sutherland said:

> "While attempts have been made to formulate a distinction between bankruptcy and insolvency, it has long been settled that, within the meaning of the constitutional provision, the terms are convertible.
>
> "From the beginning, the tendency of legislation and of judicial interpretation has been uniformly in the direction of progressive liberalization in respect of the operation of the bankruptcy power."

The court summed up its conception of the power to legislate on the subject of bankruptcy after summarizing the laws of 1800, 1841 and 1867, as follows:

> "The fundamental and radically progressive nature of these extensions becomes apparent upon their mere statement; but all have been judicially approved or

accepted as falling within the power conferred by the bankruptcy clause of the Constitution. Taken altogether, they demonstrate in a very striking way the capacity of the bankruptcy clause to meet new conditions as they have been disclosed as a result of the tremendous growth of business and development of human activities from 1800 to the present day. And these acts, far-reaching though they be, have not gone beyond the limit of congressional power; but rather have constituted extensions into a field whose boundaries may not yet be fully revealed."

"Whatever relates to the subject of bankruptcy is within the jurisdiction of Congress; and, to say that the law as existing at the time of the Revolution, or the adoption of the Constitution, shall furnish the rule and limitation of legislation, would take a large part of the subject out of their jurisdiction." *In re Reiman,* 12 Blatch. 562, 13 N. B. R. 128, 20 Fed. Cas. No. 11675.

"Where plenary power is given by the Constitution and Congress sees fit to use only a part of it, that fact will not prevent Congress from exercising the full power whenever it chooses to do so. *In re Reiman* (D. C.), Fed. Cas. No. 11673 and Id. (C. C.) Fed. Cas. No. 11675."

The New Frazier-Lemke Act Does Not Take Property Without Due Process.

The first section 75 (s) was held unconstitutional on the ground that it deprived a secured creditor (mortgagee) of property without due process of law thus violating the Fifth Amendment to the United States Constitution. Opponents insist the present section 75(s) is also invalid because it fails to comply with the due process clause.

In *Louisville Joint Stock Land Bank* v. *Radford,* 295 U. S. 555, holding the first section 75(s) void the Court listed five rights of a secured creditor which were said to have been impaired.

The "five rights" are:

1. "The right to retain the lien until the indebtedness thereby secured is paid."

2. "The right to realize upon the security by a judicial sale."

3. "The right to determine when such sale shall be held, subject only to the discretion of the court."

4. "The right to protect its interest in the property by bidding at such sale whenever held, and thus to assure having the mortgaged property devoted primarily to the satisfaction of the debt, either through the receipt of the proceeds of a fair competitive sale or by taking the property itself."

5. "The right to control meanwhile the property during the period of default, subject only to the discretion of the court, and to have the rents and profits collected by a receiver for the satisfaction of the debt."

It will be noted that this Court did not hold that the original Frazier-Lemke Act was unconstitutional because of the infringement of all of these rights. The Court held the Act unconstitutional because it was in violation of the Fifth Amendment, the due process clause of the Constitution. In fact, in *Continental Ill. Nat. Bank and Trust Co.* v. *Chicago, Rock Island and Pacific Ry.*, 294 U. S. 648, this Court in holding Section 77 of the Bankruptcy Act constitutional must have found that all of these so-called rights enumerated in the Radford case were qualified and subject to the Federal Constitution. We say this because Section 77 of the Bankruptcy Act, providing for reorganization of railroad corporations, is much more drastic and arbitrary as far as the creditor's rights are concerned than is subsection (s) of Section 75 of the Bankruptcy Act. A mortgagee's right is subject to the provisions of the Federal Constitution and the laws enacted under that Constitution.

It was held that the taking of these five so-called rights *as a group* had the effect of substantially impairing the mortgagee's security. It is clear from a reading of the Act that rights numbered (1), (2) and (4) are fully and completely preserved by the new subsection (s).

Right numbered (1). "The right to retain the lien until the indebtedness thereby secured is paid." This right is protected by subsection (s) (1) which provides that all existing liens, mortgages, pledges or encumbrances shall remain in full force and effect, and the property covered by such mortgages, liens, pledges or encumbrances shall be subject to the claims of the secured creditors as their interests may appear.

Rights numbered (2) and (4). "The right to realize upon the security by a judicial sale," and "The right to protect its interest in the property by bidding at such sale whenever held, and thus to assure having the mortgaged property devoted primarily to the satisfaction of the debt, either through the receipt of the proceeds of a fair competitive sale or by taking the property itself." These rights are protected by subsection (s) (3) which provides "that upon request in writing of any secured creditor or creditors, the Court *shall* order the property on which such secured creditors have a lien to be sold at public auction." The creditor may bid at such sale.

Rights numbered (3) and (5). "The right to determine when such sale shall be held, subject only to the discretion of the court," and "The right to control meanwhile the property during the period of default, subject only to the discretion of the court, and to have the rents and profits collected by a receiver for the satisfaction of the debt," are not substantive but remedial rights and as such subject to control under the Bankruptcy power. They are only rela-

tive or remedial rights which may be and *have been* suspended or taken away without violating the due process clause of the Fifth Amendment.

Perhaps the easiest way in which to demonstrate the relative or remedial nature of rights numbered (3) and (5) is to examine two other recent amendments to the Bankruptcy Act by which such remedial rights are taken. These sections, 77 and 77B, received judicial consideration in:

Continental Ill. Nat. Bank and Trust Co. v. *Chicago, Rock Island and Pacific Ry.*, 294 U. S. 648 (holding the original Section 77 of The Bankruptcy Act (Mar. 3, 1933, 47 Stat. 1474) constitutional).

Campbell v. *Allegany Corporation* (C. C. A. 4th, 1935), 75 F. (2d) 947, cert. denied 296 U. S. 581 (holding Section 77B of The Bankruptcy Act constitutional).

In the *Rock Island* case it was held that a creditor holding notes of the debtor could be enjoined from selling collateral securing said notes pending preparation and approval of a plan of reorganization under Section 77, this in spite of the following clause in each note:

> "Upon default of any kind hereunder, the payee may sell in * * * New York City, or elsewhere all or any of the security held for the payment of this note, at any broker's board or at public or private sale, without * * * notice. * * * And the payee may be the purchaser of any or all property, rights and/or interests so sold. * * *"

It is claimed in the instant case that the power of sale of a trustee under a deed of trust is more absolute than the right of a mortgagee to demand a foreclosure sale on a mortgage. *But such a right of sale is surely not more absolute than the right of the secured creditor to sell collateral which was suspended in the Rock Island case.*

A study of the chart, on page 23 of this brief, comparing treatment of the secured creditor's so-called five rights referred to in the *Radford* case under Sections 75(s), 77 and 77B of the Bankruptcy Act shows that in no case does Section 75(s), the Frazier-Lemke Amendment, treat creditor's rights more arbitrarily than either Section 77 or Section 77B. In most situations Section 75(s) does not go nearly so far as do the other sections.

CHART.

Creditor's rights	Section 75(s)	Section 77 (Act of Mar. 3, 1933)	Section 77B
1. Right to retain lien or security until indebtedness thereby secured is paid.	Subsection (s) (1) expressly continues existing liens and encumbrances in full force and effect.	If a plan is approved new securities may be substituted or other arrangements made.	Same as Sec. 77.
2. Right to realize upon the security by sale.	Expressly granted by Subs. (s) (3)	Denied if a plan is approved, and suspended pending approval.	Same as Sec. 77.
3. Right to determine time of sale subject to the discretion of the court.	Suspended for 3 years unless court declares emergency has ceased in its jurisdiction.	Denied if plan is approved. Suspended pending approval.	Same as Sec. 77.
4. Right to bid at sale whenever held to assure primary application of security to satisfaction of the debt.	Creditor may bid.	Denied if a plan is approved.	Same as Sec. 77.
5. Right to control property during period of default, subject only to the discretion of the court, and to have the rents and profits collected by a receiver for the satisfaction of the debt.	Control in Bankruptcy court for 3 years. Rent paid into court to pay taxes and upkeep, and remainder distributed among creditors as their interests appear. Creditor relieved of taxes, upkeep and expenses of receivership.	Under original Sec. 77, the court could appoint a trustee pending reorganization or allow debtor to continue in possession.	Same as Sec. 77.

Comparison of Treatment of "Five Rights" under Sections 75(s), 77 and 77B.

Section 75(s)(1) preserves the secured creditor's lien in full force and effect to the full value of the *specific property* securing the lien. A plan approved under either Section 77

or 77B can substitute new and different securities or none at all for the creditor's security. Sec. 77(b)(1). Sec. 77B (b)(1).

Section 75(s)(3) provides that on written request any secured creditor may have the property on which he has a lien sold at public auction. If a plan is approved under either Section 77 or 77B, the creditor is denied the right to sell the original collateral security. Pending approval of a plan the creditor was enjoined from sale of collateral in the Rock Island case, *supra*. While a reorganization plan under Section 77 or Section 77B may provide substitute security, there is no assurance that such security will be salable. At any rate a plan under 77 or 77B need not provide any security whatsoever for some classes of creditors.

Under Section 75(s) (2) the creditor's right to determine the time of sale referred to above is postponed for three years. The constitutionality of this moratorium feature is discussed at pages 42, 47 of this brief. Under Sections 77 and 77B no sale of the original collateral is allowed.

Under Section 75(s) a secured creditor *may* bid at the sale whenever held. *This assures to the creditor either the application of the proceeds of the sale to the satisfaction of his lien or else the right to take the property itself. No sale of the original collateral could occur after a plan of reorganization was approved under either Section 77 or 77B.*

Under Section 75(s)(2) the control of the property is vested in the bankruptcy court for a period of not more than three years. The debtor is allowed to keep possession, but must pay a reasonable rent into court. This rent is applied on taxes and upkeep and the remainder distributed among creditors as their interests may appear. *The court may in its discretion order the farmer to make additional payments on the principal.*

The law dispenses with the expense of receivership and substitutes the conciliation commissioner. It cleverly insures

the exercise of good husbandry by the farmer by holding out the inducement of the redemption of his farm. The farmer will naturally do a better job of farming than an unexperienced mortgage holder or a receiver compelled to operate the farm by hired labor. In the words of the Magazine of Wall Street of Feb. 18, 1933: "The borrower cannot pay and the lender cannot farm."

Under Section 77 as originally enacted on March 3, 1933, and upheld by this Court in the *Rock Island* case, a debtor could be allowed to retain possession of its property pending completion and approval of a plan of reorganization. Sec. 77(c). See *Lansdown* v. *Faris* (C. C. A. 8th, 1933), 66 F. (2d) 939. The amended Section 77, Aug. 27, 1935, 49 Stat. 926, has made mandatory the appointment of a trustee or trustees. However, it was the original Section 77 upon which this Court passed in the *Rock Island* case. Section 77B(1) allows the judge in his discretion to continue the debtor in possession after a petition is filed and pending formulation and approval of a plan of reorganization.

The foregoing comparison has considered the position of a non-assenting minority creditor under Sections 77 and 77B in a case where two-thirds of the class of creditors to which he belongs have consented to the plan of reorganization. The opinion in the *Radford* case suggests a distinction between Section 75 and Section 77 on the grounds that under certain proceedings under Section 77 two-thirds of the creditors must give their consent. That is not a constitutional distinction. The Constitution recognizes neither majorities nor minorities and most assuredly the due process clause doesn't. *Eubank* v. *Richmond*, 226 U. S. 137; *People* v. *Hurlbut*, 24 Mich. 44, 108; Story, Miscellaneous Writings, 620.

On this subject let us repeat that the Court cannot logically hold Section 77 and Section 77B constitutional, which are far more drastic than Section 75, including the new sub-

section (s), and then hold the new subsection (s) of Section 75 unconstitutional. It cannot do this unless in the eyes of the law soulless corporations are entitled to privileges that thirty million men, women, and children made of human blood and flesh are not. This we know is not the position of this or any other Court. Section 77, Section 77B and Section 75, including the new subsection (s), must stand or fall together under the Constitution. It must be clear that in enacting these provisions Congress was endeavoring to preserve the entire property structure of the nation in the interest of all the people including security holders.

This Court has held Section 77 constitutional and it has indirectly upheld the constitutionality of Section 77B in *Continental Ill. Nat. Bank and Trust Co.* v. *Chicago, Rock Island & Pacific Ry.*, 294 U. S. 648, and *Campbell* v. *Allegany Corporation* (C. C. A. 4th, 1935), 75 F. (2d) 947, cert. denied 296 U. S. 581.

Position of Non-Assenting Majority Creditors under Sections 77 and 77B.

The attention of the Court is now especially directed to the position of non-assenting secured creditors under Sections 77 and 77B *in a case where such creditors may constitute a majority of all creditors whose interests are affected by a plan of reorganization.* The sections referred to are Sections 77(g) (6) and 77B(b) (5) which are substantially similar. They provide for the protection of the *value* of liens where one-third *or more* of a given class of secured creditors refuse to consent to a plan. Since the acceptance of any such class of creditors is not required for the confirmation of a plan under 77B(e)(1) or the original 77(e), a situation can readily be contemplated under either Section 77 or 77B where a majority of secured creditors do not consent to a plan of reorganization. Still the plan could

be approved under either of the above Sections. The following provisions are quoted from 77B(b)(5):

> [A plan of reorganization] "(5) shall provide in respect of each class of creditors of which less than two-thirds in amount shall accept such plan (unless the claims of such class of creditors will not be affected by the plan, or the plan make provision for the payment of their claims in cash in full), provide adequate protection for the realization by them of the value of their interests, claims or liens, if the property affected by such interests, claims or liens is dealt with by the plan, either as provided in the plan (a) by the transfer or sale of such property subject to such interests, claims or liens, [or by the retention of such property by the debtor subject to such interests, claims or liens—this clause does not appear in Section 77], or (b) by a sale free of such interests, claims or liens at not less than the fair upset price, and a transfer of such interests, claims or liens to the proceeds of such sale; or (c) by appraisal and payment either in cash of the value either of such interests, claims or liens, or, at the objecting creditor's election, of the securities allotted to such interests, claims or liens under the plan, if any shall be so allotted; or (d) by such method as will in the opinion of the judge, under and consistent with the circumstances of the particular case, equitably and fairly provide such protection. * * * (10) * * * In the case of secured claims entitled to the provisions of clause (5) of this subdivision (b), the value of the security shall be determined in the manner provided in section 57 clause (h) of this Act, *and if the amount of such value shall be less than the amount of the claim, the excess may be classified as an unsecured claim.*"

Section 77B(e)(1) further provides:

> "A plan of reorganization shall not be confirmed until it has been accepted in writing, whether before or after the filing of the petition or answer under this section, and such acceptance shall have been filed in the

> proceeding by or on behalf of creditors holding two-thirds in amount of the claims of each class whose claims have been allowed and would be affected by the plan. * * * *Provided, however, That such acceptance shall not be requisite to the confirmation of the plan by any creditor or class of creditors* * * * (*c*) *if provision is made in the plan for the protection of the interests, claims or liens of such creditor or class of creditors in the manner provided in subdivision* (*b*) *clause* (*5*) *of this section.*''

The original Section 77(e) is similar.

The question of the constitutionality of subsection (b)(5) of Section 77B was considered by this Court in *Tennessee Publishing Co.* v. *American National Bank,* 299 U. S. 18, Nov. 9, 1936. The Court, however, expressed no opinion as to the validity of the said clause since it was found the lower courts had correctly rejected the plan of reorganization involved in the case because it was not workable.

The Court indicated that a '' 'fair and equitable' '' and '' 'feasible' '' arrangement between debtor and creditor might meet the ''good faith'' requirement of Sec. 77B.

It is difficult to distinguish the new subsection (s) of Section 75 from Sections 77(g)(6) and 77B(b)(5). Except for the three-year stay of proceedings in Section 75, the sections would seem identical in operation. Unless the Court holds that the Federal Government may not exercise a power analagous to the Police Power and thereby provide for a reasonable moratorium period, the *Rock Island* case, 294 U. S. 648, and *Campbell* v. *Allegany Corporation,* 79 F. (2d) 947, must be modified. At pages 44-54 of this brief we show that the United States *does have a power similar to the Police Power which it has constitutionally exercised in many cases.*

> ''So far as the due process clause of the Fifth Amendment is relied upon, it suffices to say that there is no basis for such reliance since it is equally well

settled that such clause is not a limitation upon the taxing power conferred upon Congress by the Constitution; in other words, that the Constitution does not conflict with itself by conferring upon the one hand a taxing power and taking the same power away on the other by the limitations of the due process clause." *Brushaber* v. *Union Pacific R. R.*, 240 U. S. 1, 24-25.

The Frazier-Lemke Amendment Is a Reasonable Adaptation of Bankruptcy Proceedings to Farmers' Conditions.

Like the first Frazier-Lemke Bankruptcy Amendment, the present Section 75(s) is an attempt to adapt bankruptcy proceedings to the general agricultural situation. These Acts are among a series of Bankruptcy Amendments which were enacted at intervals following an investigation of bankruptcy law and procedure made under the supervision of the Attorney General.

On February 29, 1932, President Hoover submitted a report of the results of this investigation to Congress. See Senate Document 65, 73rd Congress, 1st Session. The President said:

> "The bankruptcy act should be amended to provide remedial processes in voluntary proceedings under which debtors, unable to pay their debts in due course, for the purpose of composing or extending the maturity of their debts, of amortizing the payment of their debts out of future earnings, of procuring the liquidation of their property under voluntary assignment to a trustee; or in the case of corporations for reorganization."

Subsequently Sections 74, 75, 77 and 77B were enacted. All of these recent Bankruptcy Amendments had the same purpose back of them: To make bankruptcy procedure more flexible and more adaptable to the different problems existing in relation to different classes of debtors and property. Because of the numerous differences between a corporate

or railway debtor, and a farmer debtor, what is a reasonable bankruptcy provision in one case may not be reasonable in the other and *vice versa*.

In bankruptcy proceedings the court should be influenced by the consideration that a man can ordinarily do better with his own property and realize more therefrom, than can be obtained in the course of judicial proceedings, with compulsory sales and expenses of administration. *In re Arrington Co.* (D. C. Va., 1902), 113 F. 498.

In *Dallas Joint Stock Land Bank* v. *Davis*, *supra*, Judge Hutcheson said of the new Frazier-Lemke Act:

> "On its face the act merely transfers the liquidation of the indebtedness from state courts to the court of bankruptcy. It remits to the judicial discretion of that court the administration of the property of a bankrupt, with the end in view to bring about, if a due regard for the property rights and interests of his creditors permits it, a gradual and therefore more just and equitable liquidation in lieu of an unduly hasty and forced one. Subsection (s) of the act as amended does indeed authorize a stay of proceedings for a maximum period of 3 years, during which time the debtor may remain in possession, *but the stay so granted is not an absolute one*. It is one granted and continued in the judicial discretion of the court if, and only if, this may be done without deprivation of or injury to, and upon conditions looking to the preservation of, the creditor's security. Under its provisions the court may fix, and require the debtor to pay a reasonable rental on the property to be applied upon the debt. Under its provisions, the court may, and if in the exercise of a sound discretion the protection and preservation of the security demand it, must require additional payments on the principal sum due and owing. Under its provisions, the court may, upon a finding that the preservation of the security requires it, revoke the stay order and direct the sale of the property.
>
> "These provisions of the act make it clear, we think, that the act grants no absolute stay, permits no arbi-

trary or unjust interference with creditors. It merely remits all questions to an informed judicial discretion, a discretion which, keeping the preservation of the security paramount, may yet, if circumstances permit, afford a means of relief to the debtor. They make it clear that the controlling, the dominant purpose and effect of the act as amended is not to deprive creditors of their security to give it to debtors, but to remit to judicial discretion in each case, whether the facts justify giving the debtor an equitable opportunity in an orderly way, to liquidate his indebtedness, provided always that the essential security of the creditor is not impaired but preserved. A law on the subject of bankruptcies having this purpose and effect is not, in our judgment, violative of the Fifth Amendment. * * *"

Reasonableness and Necessity of Frazier-Lemke Amendment Shown by Statistics.

The necessity for the Frazier-Lemke Amendment can not be doubted by any person informed concerning conditions since 1920 pertaining to agriculture. Prices for agricultural products paid to the farmer (which are quite different from the prices paid by the ultimate consumer) have consistently fallen lower and lower until for such products as milk, eggs, livestock, wheat, hay, cotton and corn he has actually received less than the cost of production. The price of alfalfa hay at the farm has been as low as two dollars per ton. As a group farmers have been compelled to meet expenses out of their capital by mortgaging their farms. Both mortgagors and mortgagees confidently expected farm incomes to increase. Instead of increasing they decreased quite steadily since 1920. Prices paid *by the farmer* for necessary agricultural machinery, fertilizer, prepared feed stuffs for completing balanced rations, etc., not to mention taxes, have remained stationary or have actually increased in the face of falling land values. In one

year the *total cash income* (not net income) of all the farmers of the United States was less than the total interest and tax exemptions on the total public debt.

The *Senate Judiciary Committee Report, No. 985,* and the *House Judiciary Committee Report, No. 1808,* 74th Congress, 1935, contained the following statements:

> "It is not necessary for the committee to point out the necessity for this legislation. There are few members in this Congress that have not already received numerous letters, many of them from conciliation commissioners and referees, pointing out that before the Supreme Court held subsection (s) of Section 75 unconstitutional, they were able to settle nine out of every ten cases out of court because of the Frazier-Lemke Amendment, but that since the decision wholesale foreclosures have been started. The fact that there is now a higher price for agricultural products has made the property more attractive, and many mortgagees have taken advantage of this fact, and are now foreclosing, whereas before the increase in price, they were quite willing to permit the farmer to continue and do the best he could.
>
> "Many state moratoriums, and there were 26, are about to expire, and when they expire, there undoubtedly will be an avalanche of foreclosures; whereas, if this bill is passed, these foreclosures will be held in abeyance. Nine out of ten of the distressed farmers will be able to get adjustments outside of court, because of the moral effect of the act, and in the rest of the cases, there will be orderly liquidation, with a view of the rehabilitation of the farm debtor, as well as full protection to the creditors. This the public conscience, as well as public interest and welfare, demands."

The declarations of the existence of an emergency by a legislative body can not be regarded as a subterfuge or as lacking in adequate basis. *Home Building and Loan Asso-*

ciation v. *Blaisdell,* 290 U. S. 398, 78 L. Ed. 413; *Block* v. *Hirsh,* 256 U. S. 135, 65 L. Ed. 865.

47 Harvard Law Review, page 300:

> "Despite a widespread attempt to secure voluntary time extensions, it became apparent by 1933 that disastrous social and economic consequences would ensue unless positive relief was granted."

86 A. L. R. 1539, 1542:

> "Such an emergency is presented by the present depression. Widespread unemployment in all lines of work, rioting, open defiance of the processes of the courts, millions of citizens dependent on charity and wholesale mortgage foreclosures and the accumulation of deficiency judgments, are all elements frought with dangers which threaten the very existence of government. That the states, in time of emergency may adopt measures which could not be sustained in normal times, can not now be doubted. The New York and District of Columbia Rent Law cases definitely established this principle."

The agricultural depression began in 1921. The bulletin of the Bureau of Agricultural Economics, February 1, 1935, shows the following facts concerning the percentages of farm income compared with national income.

In 1921 it fell to 12.6 per cent or $4,000,000,000.00.

In 1930 it had fallen to 8.7 per cent.

In 1931 it was 7.7 per cent.

In 1932 it was 7.5 per cent.

In 1933 the price of agricultural land in Iowa had fallen from $236.00 an acre in 1921 to $70.00.

Professor Paul H. Douglas gives an estimate of 1½ billions of dollars as the total net cash income of the farmers in 1932. "Know America," page 57.

While the percentage of agricultural income compared with total national income was decreasing from 8.7 per

cent in 1930 to 7.5 per cent in 1932, the total national income was also decreasing absolutely from $72,973,000,000.00 in 1930 to $47,964,000,000.00 in 1932. World Almanac, 1936. Not only was the percentage of agricultural income decreasing but also the base on which that percentage was figured was also decreasing. The farmer's income was decreasing both relatively and absolutely.

The Federal Home Loan Bank Review is authority for the statement that during the first eight months of 1936 the Farm Credit Administration has foreclosed or arranged to foreclose 30,627 farm mortgages or at the rate of 3,782 per month. This is exclusive of all private holders of farm mortgages.

51 Magazine of Wall Street 470. February 18, 1933:

> "The farm mortgage situation is more acute than it appears. Less than half of the farms are not mortgaged, leaving the rest to carry the enormous mortgage load. Here is another angle of the problem: From 1914 to 1929 the massed purchasing power of all producers increased 61 per cent, that of the farmers, only 21 per cent. Manufacturing laborers gained 108 per cent, while management and capital gathered in a gain of 153 per cent. Something had to break. Something did break in 1929. Other things are breaking now. The ground is being cleared for a more or less complete readjustment of that portion of the private debt problem represented by mortgages.
>
> "Again, farm mortgages have been a persistent curse since 1920. Urban mortgages have been a baffling problem for only two or three years. The farmers have paid off a billion of non-mortgaged debt since the great debacle of 1920-21. Since the 1929 explosion they have forfeited another billion of wealth to satisfy mortgages and taxes—and a tax lien is, after all, only a super-first mortgage. Paint black the tax-delinquent farms and the map of rural America takes on a dark

and foreboding aspect. And real estate mortgages are not all of the blackness, for the farmers have, also, indebtedness not secured by land of about three billions—close to 12 billions all told."

51 Magazine of Wall Street 472. February 18, 1933:

"The conviction is general that the interest rates that prevailed before 1929 must be forgotten; this is true in practically every species of financial obligation. * * * It is not human nature, at least not of the American stripe, for a whole generation to endure sacrificial torture out of respect to a dead and decaying past. Debts contracted on the security of land when it was worth five times as much and yielded several times as much as now in money income and purchasing power can not endure. They are as incongruous with the new environment as high heels and desert sand. * * * Mortgages based on valuations that are as obsolete as the five toed horse will be rewritten in relation to the facts. A $20,000 mortgage on a $10,000 farm is only a fantastic memory. The borrower cannot pay and the lender cannot farm."

Recent Improvements in Farm Conditions Show that Suspension of Sale of Farm Property Will Benefit Both Creditor and Debtor.

If the foregoing statistics indicated that agricultural property and income had definitely slumped to a lower standard of value from which there could be no hope of recovery, it might be conceded that the Frazier-Lemke Amendment was only attempting to postpone an inevitable dispossession of farm home owners. Recent figures, however, paint a brighter picture. They indicate that the value of farm property is increasing. They also indicate that the prices paid for farm products are increasing in relation to the prices the farmer pays for the products which he consumes.

The following quotations are from the Yearbook of Agriculture (1936), pages 28-33:

Farm Income.

"It is too early as yet to estimate, except roughly, the return to farmers from their production in 1935. Marketing of the crops will not be finished until well along in 1936. Present indications are that the farmers' gross income from this year's production, and from rental and benefit payments, will be approximately, $7,800,000,000. This total may be compared with $7,300,000,000. gross income from the production of 1934, and $5,337,000,000. in 1932 when the depression was at its worst. In 1929 in which year the gross farm income was at the highest level since 1920, the total was nearly $12,000,000,000. While the gross farm income for 1935 is approximately one-third lower than that of 1929, the prices paid by farmers for goods and services are about one-fifth lower. The 1935 gross farm income will have about four-fifths of the purchasing power that the gross farm income of 1929 had. * * *"

Purchasing Power of Farm Commodities.

"In the 2 years ended February 1935 the general level of farm prices more than doubled; since then the trend has been slightly downward. The greatest advances since 1933 have been in grain, cotton and livestock prices. In the second half of 1933 and in the first half of 1934 the prices of the things that farmers buy rose rapidly. The result, of course, was to partly offset the advantage to agriculture of the rise in farm prices. In the last year or so the prices of commodities purchased by farmers have remained practically unchanged at around 126 per cent of the pre-war level. In September 1935, when the farm-price index was 107, the purchasing power per unit of farm products for articles farmers buy was 86 per cent of the pre-war average. * * *"

Valuation of Farm Assets.

"Still another significant factor in the welfare of agriculture is the change in the valuation of farmers' assets. This change may result from changing prices for farm land and livestock and from increases or decreases in farm inventories. From 1930 to 1933 the value of farm property in the United States declined nearly $22,000,000,000. It has recovered moderately in the last 2 years but is still nearly $20,000,000,000. less than in 1930. On a reduced property valuation, a given monetary income will show a higher rate of return and *vice versa.* * * * The income available to farm operators for labor, capital and management from the production of 1934 was $3,468,000,000. as compared with $2,683,000,000 in 1933 and $1,492,000,000. in 1932. The figures given above may be compared with $5,669,000,000. for 1929, the last pre-depression year. These figures make no allowances for delinquencies in interest and tax payments, which in recent years have increased markedly. In 1934, however, the farmers paid considerable amounts in deferred taxes and interest; * * *"

Farm Land Values.

"Farm land values tend normally to vary with farm earning power, current and prospective, and the prevailing recovery follows a long period during which the curve was downward. This Department's index of the average value per acre of farm real estate rose, in the 12-month period ending March 1, 1935, from 76 to 79 per cent of the pre-war level."

Interpretation of Statistics Quoted.

The above quotations clearly indicate that farm income and the valuation of farm property is gradually increasing. At the same time this income and valuation is still considerably below normal. The farmer has every prospect of eventually regaining his normal position in society, but he must be given time to do so.

The traditional theory of a mortgage or deed of trust is that the mortgaged or pledged property is to stand as security for the debt. *Conard* v. *Atlantic Ins. Co.*, 1 Pet. 386; *Hutchins* v. *King*, 1 Wall. 53; *Terrell* v. *Allison*, 21 Wall. 289; *Gilman* v. *Illinois, etc., Tel. Co.*, 91 U. S. 603. Any creditor who merely desires to have the payment of a debt owed him secured is not harmed by a delay in sale of the security when the valuation of agricultural property is generally on the increase. So long as he has the right to have a sale within a reasonable time, the creditor is benefited by the interim increase in value.

Farm Debt Situation Still Desperate.

While the value of farm lands has increased the agricultural debt structure has remained practically the same except as reduced by foreclosures. The increase in the value of farm lands has in fact stimulated foreclosures. This increase in value is due to an increase in agricultural commodity prices, and also because the money in circulation has been increased by over half a billion, as shown by a comparison of the Treasury Circulation Statement of United States Money of November 30, 1935, with a similar statement of November 30, 1936. While money is easier in some respects, yet there is little money available for farm loans, The truth is that the farmer who really needs help cannot get it. As a result hundreds and thousands of farm foreclosures and evictions are taking place in practically every part of this nation.

The Farm Credit Administration informs us that during 1935 the Federal Land Banks and Land Bank Commissioner closed loans amounting to $445,066,549 and that during the same year they received applications for loans amounting to $811,081,485. In other words, the Federal Land Banks and Commissioner were unable, or for some reason did not make loans for $366,014,963 in 1935. These farmers are

those who really needed help. Since the Federal Land Banks are the most liberal in making farm loans, it is readily seen that these farmers are unable to get financial assistance anywhere at this time.

Again in 1936 the Farm Credit Administration informs us the Federal Land Banks and the Land Bank Commissioner closed loans amounting to $174,843,496 and that they received applications for loans amounting to $348,535,793. In other words in 1936 the Federal Land Bank was unable to accept applications amounting to $173,692,297.

The Frazier-Lemke Act is Consistent with the Theory of Bankruptcy in the United States.

A number of Supreme Court cases have pointed out that the purpose of the Bankruptcy Act was two-fold: First, to provide for an equitable distribution of the bankrupt's estate among his creditors. Second, to rehabilitate the bankrupt and to give him a fresh start in life free from the burden of his debts. *Neal* v. *Clark*, 95 U. S. 704; *Traer* v. *Clews*, 115 U. S. 528; *Burlingham* v. *Crouse*, 228 U. S. 459; *Hanover Nat. Bank* v. *Moyses*, 186 U. S. 181; *Williams* v. *U. S. F. & G. Co.*, 236 U. S. 549; *Maynard* v. *Elliott*, 283 U. S. 273;

> "This purpose of the act has been again and again emphasized by the courts as being of public as well as private interest, in that it gives to the honest but unfortunate debtor who surrenders for distribution the property which he owns at the time of bankruptcy a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt." (*Local Loan Co.* v. *Hunt*, 292 U. S. 234, at p. 244.)

The Court Has Stressed the Fact that the Bankruptcy Act is Founded on Sound Public Policy.

In *Stellwagen* v. *Clum*, 254 U. S. 605, Mr. Justice Day states that discharge is a main purpose of the Act, and

"Our decisions lay great stress on this feature of the law—as one not only of private but of great public interest, in that it secures to the unfortunate debtor, who surrenders his property for distribution, a new opportunity in life." *In re Klein*, 1 How. 279, states:

> "For the present it will only be necessary to say that one prominent reason why the power is given to Congress was to secure to the people of the United States, as one people, a uniform law, by which a debtor might be discharged from the obligation of his contracts, and his future acquisitions exempted from his previous engagements; that the rights of debtor and creditor equally entered into the mind of framers of the Constitution."

In the *Rock Island* case, *supra*, the Court quotes with approval from *Canada Southern R. Co.* v. *Gebhard*, 109 U. S. 527, 536:

> "The confirmation and legalization of 'a scheme or arrangement' under such circumstances (an agreement made by railroads with their creditors under a Canadian statute) is no more than is done in bankruptcy when a 'composition' agreement with the bankrupt debtor, if assented to by the required majority of the creditors, is made binding on the non-assenting minority. In no just sense do such governmental regulations deprive a person of his property without due process of law. They simply require each individual to so conduct himself for the general good as not unnecessarily to injure another. Bankrupt laws have been in force in England for more than three centuries, and they had their origin in the Roman Law. The Constitution expressly empowers the Congress of the United States to establish such laws. Every member of a political community must necessarily part with some of the rights which, as an individual, not affected by his relation to others, he might have retained. Such concessions make up the consideration he gives for the

obligation of the body politic to protect him in life, liberty, and property. Bankrupt laws, whatever may be the form they assume, are of that character."

It Is Within the Power of the Court to Transfer the Creditor's Lien to the Proceeds of a Sale of the Property, and to Allow the Bankrupt to Repurchase the Property.

The power to transfer a lien from property to the cash proceeds of a sale of the property has been authoritatively determined by the decision of this Court in the case of *Van Huffel* v. *Harkelrode,* 284 U. S. 225, 78 A. L. R. 453, and note. This was an action to quiet title to land purchased by plaintiff acquired from the purchaser at a sale made by a bankruptcy court, which made an order that all liens be marshaled; that the property be sold free of all encumbrances and that the rights of all lien-holders be transferred to the proceeds of the sale. Defendant was a county treasurer asserting a lien for State taxes and claimed that the court was without power to order the sale and never acquired jurisdiction over the State. It was pointed out that there was no statute expressly conferring such power. This Court held that such power is possessed by courts of equity, and that the federal courts had exercised it in equity in many cases and that the courts of bankruptcy possessed jurisdiction in equity for the exercise of this power. It was held that the bankruptcy courts have express power under Section 64 to determine the amount or legality of any tax. It then said:

> "To transfer the lien from the property to the proceeds of the sale is the exercise of a lesser power; and legislation conferring it is obviously constitutional. Realization upon the lien created by the state law must yield to the requirements of bankruptcy administration."

In some cases the courts have allowed the bankrupt to repurchase his property. *Traer* v. *Clews,* 115 U. S. 528;

Sparhawk v. *Yerkes,* 142 U. S. 1. Section 70(a) (5) of the Bankruptcy Act expressly permits the bankrupt to redeem certain insurance policies by payment of the cash surrender value to the trustee.

Congress May, under the Bankruptcy Power, Stay Judicial Proceedings for Three Years.

It has already been pointed out, *supra,* at pages 22-28, that these rights have been suspended or taken away under both Sections 77 and 77B of the Bankruptcy Act. It has also been held by this Court that these so-called rights could be suspended or taken away by States through the exercise of the Police Power.

In *Home Building and Loan* v. *Blaisdell,* 290 U. S. 398, it was held that the Minnesota legislature could through a moratorium law stay judicial foreclosure sale proceedings for a reasonable time. (Two years.)

The experience with bankruptcy administration has not been such even in normal times and under normal conditions to insure distribution in much less than 3 years. In times of emergency and economic distress it takes longer, because the problem of liquidation is more difficult and slower due to lack of buyers of bankrupt estates.

Various studies have been made of this question. In March, 1930, the so-called Donovan report was published. It was prepared by William J. Donovan, Esq., formerly Assistant Attorney General of the United States. He states that, while the tables of figures published are based on New York City Bankruptcy cases, they have been compared with similar statistics from all over the nation and are fairly representative of the country as a whole.

He pointed out that it took about 1 year to close the average no-asset cases and many 2, 3, 4 or even 6 years (p. 198-199). An interesting table at p. 354 shows that 5 years for the closing of a bankrupt estate is not at all un-

common. During that period liquidation goes on and distribution is not finally made until the estate is closed. The table is short and is as follows:

"Periods (in days) from filing of petition to close of case.

Liquidation Cases	Average Period.	Longest Period.	Shortest Period.
(a) No asset cases	331.3	2842 (8 yrs.)	61
(b) Nominal assets	620.3	2695 (7 yrs.)	62
(c) Gross assets under $10,000 (exclusive of (a) and (b)	697.7	3100 (8 yrs.)	107
(d) Gross assets over $10,000	1231.6	4419 (12 yrs.)	273
Average, all classes	720."		

We give these figures, as Mr. Donovan does, as facts and without criticism. Congress was undoubtedly familiar with them.

In the famous rent cases tenants were allowed to remain in possession of the leased premises over the objection of the lessor provided reasonable rent was paid. *Levy Leasing Co.* v. *Siegal*, 258 U. S. 242; *Marcus Brown Holding Co.* v. *Feldman*, 256 U. S. 170. (These two cases came up under an act passed by the New York State Legislature. The tenants were permitted to retain possession from September 27, 1920 to November 1, 1922.) *Block* v. *Hirsh*, 256 U. S. 135. (This case came up under an act of Congress enacted for the District of Columbia. It permitted tenants to retain possession for two years.)

In the next section of this brief it will be shown that the Federal Government may within the scope of its granted authority exercise a power similar to the Police Power of the states. The power to pass laws on the "subject of bankruptcies" being expressly granted to Congress by Article I, Section 8, clause 4 of the Constitution, Congress

should, while acting within the scope of this granted power, be able to constitutionally exercise any power which a state could exercise under similar circumstances.

The Police Power of the United States.

In 6 Ruling Case Law, "Constitutional Law", paragraph 182, the police power is said to be, "an attribute of sovereignty, possessed by every sovereign state, and is a necessary attribute of every civilized government."

Bouvier defines police power as "the powers of government inherent in every sovereignty." "The power vested in the Legislature to make such laws as they shall judge to be for the good of the commonwealth and its subjects."

Congress has the same police power within the grants of power enumerated in the Constitution as the states have within their reserved powers. Wherever the Federal government has police power it is precisely the same police power that the states exercise.

Police power is a concomitant and inherent incident of all sovereignty. It is not a separate legislative power such as the power to tax, the power to regulate commerce, the power to legislate on the subject of bankruptcies, the power to coin money, and so forth. Wherever political power is, there is an exercise of sovereignty and with it goes the incidental police power inseparably attached to it. The Constitution does not grant police power in any of the eighteen clauses granting power under Section VIII of Article I. The Tenth Amendment in providing that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are preserved to the states respectively, or to the people," refers to specifically delegated powers and not to those attributes of sovereignty incidental to those powers which are delegated. Wherever sovereignty goes, police power goes to the full limits of the sovereignty without restraint. Wherever sovereignty is re-

stricted there in all respects and to the exact extent the inherent police power is also restricted and limited. This is true alike of state sovereignty and of Federal sovereignty.

An expression sometimes used in discussions of police power is that the states did not in the Constitution delegate their police power to the United States. The argument runs that by the Tenth Amendment "the powers not delegated to the United States, by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people"; that consequently the police power is reserved to the states and therefore the United States government has no police power. This statement is not accurate. The correct statement concerning the exercise of police power as it relates to the states and to the Federal government, respectively, is as follows: Police power is an attribute of all sovereignty. Whatever sovereignty the people have not ceded to the United States together with the police power inherent within such sovereignty is reserved to the states as an attribute of their respective sovereignties. The United States in respect to all sovereignty granted to it by the people is in such respects endowed with all attributes of such sovereignty including the complete exercise within such sovereignty of the police power.

12 *Corpus Juris,* "Constitutional Law", page 910, says (concerning the federal police power):

> "Within the states Congress may exercise no police power as such, and may affect it only by the enactment of statutes within the powers conferred on it by the Constitution of the United States, either expressly or by clear implication."

65 *Corpus Juris,* "United States", page 1255, paragraph 5:

> "So, too, although the United States has no general police power, it has whatever police power is appro-

priate to the exercise of any attribute of sovereignty specifically granted to it, and may, by virtue of its sovereignty, take such measures as are necessary to insure peace and order in performance of any of its functions. The scope and incidents of the government's express and implied powers are the same, and a power may be implied as an incident to a power which is itself implied."

The growth of the conception of police power generally is illustrated in *Euclid* v. *Ambler*, 272 U. S. 365, which sustained as within the police power a zoning ordinance forbidding the use of real estate for industrial purposes, for which its value was $10,000 per acre, and restricting its use to residential purposes at a value of $2,500. (P. 384 of the opinion.) Justice Sutherland in the opinion pointed out, at pages 386 and 387 that zoning ordinances had existed for about twenty-five years and were uniformly sustained, but fifty years previously would probably have been rejected as arbitrary and oppressive. Then the opinion continues: "And in this there is no inconsistency, for while the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operations. In a changing world it is impossible that it should be otherwise". The United States Department of Commerce, Bureau of Standards, in Circular Letter LC-374, dated May 5, 1933, estimated the number of municipalities in the United States having zoning ordinances at 1236. Such legislation under the police power effectively destroys the value of real estate without payment to the owner. He is deemed to benefit from the general benefits accruing to the community.

The Moratorium is a Proper Exercise of Federal Police Power.

All the powers granted to the United States by Article I, Section VIII are cognate powers.

Constitution of the United States, Article I, Section 8.

Clause 1. "The Congress shall have power" to lay and collect taxes.

Clause 2. To borrow money.

Clause 3. To regulate commerce.

Clause 4. "To establish an uniform rule of naturalization and uniform laws on the subject of bankruptcies throughout the United States."

Clause 5. To coin money, and fix weights and measures.

Clause 6. To punish counterfeiting.

Clause 7. To establish post offices and postroads.

Clause 8. To grant patents and copyrights.

Clause 9. To constitute Federal courts.

Clause 10. To define and punish piracies, etc.

Clause 11. To declare war, etc.

Clause 12. To raise armies.

Clause 13. To provide a navy.

Clause 14. To govern land and naval forces.

Clause 15. To call out the militia.

Clause 16. To organize the militia.

Clause 17. To govern the seat of government and government property.

Clause 18. "To make all laws which shall be necessary and proper for carrying into execution the foregoing powers." * * *

It is within the respective fields of sovereignty enumerated in the foregoing cognate powers that Congress may exercise full police power to the same extent that a state Legislature may exercise police power within the fields of

sovereignty not granted to the Federal government. There is no difference in the police power exercised; the only difference is in the particular fields of sovereignty which are exercised.

In *Hamilton* v. *Kentucky Distilleries*, 251 U. S. 146, 156, Mr. Justice Brandeis said in the opinion of the court:

> "That the United States lacks the police power, and that this was reserved to the states by the Tenth Amendment, is true. But it is none the less true that when the United States exerts any of the power conferred upon it by the Constitution, no valid objection can be based upon the fact that such exercise may be attended by the same incidents which attend the exercise by a state of its police power, or that it may tend to accomplish a similar purpose." • • •
>
> "The war power of the United States, like its other powers and like the police power of the states, is subject to applicable constitutional limitations, • • • but the Fifth Amendment imposes in this respect no greater limitation upon the national power than does the Fourteenth Amendment upon state power." • • •

The opinion proceeds to give, as illustrations of the statement just quoted, the same cases which other authorities cite to illustrate the police power of the Federal government within its granted sovereignty. We quote pertinent parts from each of the cases cited by Mr. Justice Brandeis:

Commerce Clause (prohibition of lottery shipments): *Champion* v. *Ames*, 188 U. S. 321, 357:

> "As a state may for the purpose of guarding the morals of its own people, forbid all sales of lottery tickets within its limits, so Congress for the purpose of guarding the people of the United States against the 'widespread pestilence of lotteries' and to protect the commerce which concerns all the states, may prohibit the carrying of lottery tickets from one state to another." • • •

"What was said by this court upon a former occasion may well be here repeated: 'The framers of the Constitution never intended that the legal power of the nation should find itself incapable of disposing of a subject matter specifically committed to its charge.' *In re Rhorer*, 140 U. S. 545, 563."

Taxation clause (restricting sale of oleomargarine): *McCray* v. *U. S.*, 195 U. S. 27, 59:

"Since, as pointed out in all the decisions referred to, the taxing power conferred by the Constitution knows no limits except those expressly stated in that instrument, it must follow, if a tax be within the lawful power, the exertion of the power may not be judicially restrained because of the results from its exercise."

In passing the opinion observed that the Fifth and Tenth Amendments did not interfere with the granted power involved in the decision and said:

"Whilst undoubtedly both the Fifth and Tenth Amendments qualify, in so far as they are applicable, all the provisions of the Constitution, nothing in those amendments operates to take away the grant of power to tax conferred by the Constitution upon Congress. The contention on this subject rests upon the theory that the purpose and motive of Congress in exercising its undoubted powers may be inquired into by the courts, and the proposition is therefore disposed of by what has been said on that subject."

That is, this Court held that the Fifth and Tenth Amendments have their proper application in the consideration of the constitutionality of an act of Congress but they do not deprive the United States of the exercise of police powers.

Commerce clause (prohibition of adulterated food shipments): *Hipolite Egg Co.* v. *U. S.*, 220 U. S. 45, 57, 58:

"The statute rests, of course, upon the power of Congress to regulate interstate commerce; and, defining

that power, we have said that no trade can be carried on between the states to which it does not extend, and have further said that it is complete in itself, subject to no limitations except those found in the Constitution." * * * "The question in the case, therefore, is, what power has Congress over such articles? Can they escape the consequences of their illegal transportation by being mingled at the place of destination with other property? To give them such immunity would defeat, in many cases, the provision for their confiscation, and their confiscation or destruction is the especial concern of the law. The power to do so is certainly appropriate to the right to bar them from interstate commerce, and completes its purpose, which is not to prevent merely the physical movement of adulterated articles, but the use of them, or rather to prevent trade in them between the states by denying to them the facilities of interstate commerce."

Commerce clause (White Slave Act), *Hoke* v. *United States,* 227 U. S. 308, 321, 323. Justice McKenna in the opinion said:

"Congress is given power 'to regulate commerce with foreign nations and among the several states.' The power is direct; there is no word of limitation in it, and its broad and universal scope has been so often declared as to make repetition unnecessary. And besides, it has had so much illustration by cases that it would seem as if there could be no instance of its exercise that does not find an admitted example in some one of them. Experience, however, is the other way, and in almost every instance of the exercise of the power differences are asserted from previous exercises of it and made a ground of attack."

"The principle established by the cases is the simple one, when rid of confusing and distracting considerations, that Congress has power over transportation 'among the several states;' that the power is complete in itself, and that Congress, as an incident to it, may

adopt not only means necessary but convenient to its exercise, and the means may have the quality of police regulations."

The last paragraph was also quoted and was approved by the Supreme Court in *Caminetti* v. *U. S.*, 242 U. S. 470, 492.

Commerce clause (prohibition of false labels), *Seven Cases* v. *U. S.*, 239 U. S. 510, 514, 515:

> "So far as it is objected that this measure, though relating to articles transported in interstate commerce, is an encroachment upon the reserved powers of the states, the objection is not to be distinguished in substance from that which was overruled in sustaining the White Slave Act, 36 Stat. at L. 825, Chap. 395, Comp. Stat. 1913, Section 8812. *Hoke* v. *United States*, 227 U. S. 308. There, after stating that 'if the facility of interstate transportation' can be denied in the case of lotteries, obscene literature, diseased cattle and persons, and impure food and drugs, the like facility could be taken away from 'the systematic enticement of and the enslavement in prostitution and debauchery of women,' the court concluded with the reassertion of the simple principle that Congress is not to be denied the exercise of its constitutional authority over interstate commerce, and its power to adopt not only means necessary but convenient to its exercise, because these means may have the quality of police regulations."

Taxation clause (prohibition of narcotic drug trade), *U. S.* v. *Doremus*, 249 U. S. 86, 93, 94:

> "Of course, Congress may not, in the exercise of federal power, exert authority wholly reserved to the states. Many decisions of this court have so declared. And from an early day the court has held that the fact that other motives may impel the exercise of federal taxing power, does not authorize the courts to inquire into that subject. If the legislation enacted has some reasonable relation to the exercise of the taxing author-

ity conferred by the Constitution, it cannot be invalidated because of the supposed motives which induced it." • • •

"Nor is it sufficient to invalidate the taxing authority given to the Congress by the Constitution that the same business may be regulated by the police power of the state." • • •

"The act may not be declared unconstitutional because its effect may be to accomplish another purpose as well as the raising of revenue. If the legislation is within the taxing authority of Congress—that is sufficient to sustain it."

The following two cases were also cited by Mr. Justice Brandeis in the *Hamilton* v. *Kentucky Distilleries* case, 251 U. S. 157, to show (quoting his words), that "the Fifth Amendment imposes in this respect no greater limitation upon the national power than does the Fourteenth Amendment upon state power".

In Re Kemmler, 136 U. S. 436, 438:

"As due process of law in the Fifth Amendment referred to that law of the land which derives its authority from the legislative powers conferred on Congress by the Constitution of the United States, exercised within the limits therein prescribed, and interpreted according to the principles of the common law, so, in the Fourteenth Amendment, the same words refer to that law of the land in each state, which derives its authority from the inherent and reserved powers of the state, exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions."

Carroll v. *Greenwich Ins. Co.,* 199 U. S. 401, 410:

"While we need not affirm that in no instance could a distinction be taken, ordinarily if an act of Congress is valid under the Fifth Amendment, it would be hard to say that a state law in like terms was void under the Fourteenth."

Also in the case of *Brooks* v. *U. S.*, 267 U. S. 432, 436 (motor vehicle transportation), it was said by Mr. Chief Justice Taft:

> "Congress can certainly regulate interstate commerce to the extent of forbidding and punishing the use of such commerce as an agency to promote immorality, dishonesty or the spread of any evil or harm to the people of other states from the state of origin. In doing this it is merely exercising the police power, for the benefit of the public, within the field of interstate commerce."

Block v. *Hirsh*, "Rent Law Case", 256 U. S. 135, 155 (Federal police power under the power granted by clause 17 to govern the District of Columbia). From the opinion of the court by Justice Holmes:

> "The fact that tangible property is also visible tends to give a rigidity to our conception of our rights in it that we do not attach to others less concretely clothed. But the notion that the former are exempt from the legislative modification required from time to time in civilized life is contradicted not only by the doctrine of eminent domain, under which what is taken is paid for, but by that of the police power in its proper sense, under which property rights may be cut down, and to that extent taken without pay."

The sovereignty of the United States under Clause 4, Section VIII, Article 1 to "establish uniform laws on the subject of bankruptcies" is as untrammeled as any of the other sixteen cognate sovereignties granted in the same section.

The moratorium in subsection (s) under the power of Congress to legislate upon "the subject of bankruptcies" is a proper exercise of the Federal police power. It is as valid as the power of a state to enact a moratorium during the existence of the same emergency under its police power. The state may exercise such police power despite the con-

stitutional prohibition in the Fourteenth Amendment that a state may not impair the obligation of a contract. *Home Building and Loan Association* v. *Blaisdell,* 290 U. S. 231, and in the words of Justice Brandeis in *Hamilton* v. *Kentucky Distilleries,* 251 U. S. 157, the Fifth Amendment imposes no greater limitation upon the national power than does the Fourteenth upon state power.

The Frazier-Lemke Act Does Not Deny Full Faith and Credit to State Laws and Judicial Decrees

Some opponents of the Frazier-Lemke Act have argued that the Act violates Article IV, Section 1 of the Constitution. (The Full Faith and Credit Clause.) They argue that when the jurisdiction of a state court has first attached to real estate in a foreclosure action such jurisdiction is exclusive so that Congress may not confer any jurisdiction upon a bankruptcy court.

This argument is faulty because it fails to recognize that Congress' power to legislate upon the subject of bankruptcies is not concurrent with state power, but is general, unrestricted, unlimited, plenary and paramount. This has been recognized by the courts in a long line of cases beginning with *Sturges* v. *Crowninshield,* 4 Wheat. 122. At page 192, Mr. Chief Justice Marshall said it was "unlimited and supreme." See also *In re Klein,* 1 How. 277; *In re Reiman,* 7 Ben. 455, 20 Fed. Cas. 11673; *International Shoe Co.* v. *Pinkus,* 278 U. S. 261, 265; *New York* v. *Irving Trust Co.,* 288 U. S. 329, 333.

> "But, as between District Courts sitting in bankruptcy, and State Courts for the administration of insolvent estates, there is no concurrent jurisdiction. The Constitution of the United States, by giving to Congress the power to pass uniform bankruptcy laws, gives to the Courts in which Congress shall vest this,

power paramount jurisdiction in bankruptcy proceedings."

Leidigh Carriage Company v. *Stengal,* 95 Fed. 637.

In *Taubel, etc. Co.* v. *Fox,* 264 U. S. 426, 430, the Court said:

"Congress has, of course, power to confer upon the bankruptcy court jurisdiction to adjudicate the rights of trustees to property adversely claimed. In matters relating to bankruptcy its power is paramount."

"If this objection were to be sustained, it would seriously embarrass the enforcement of the Bankruptcy Law, and make it subordinate to the State insolvency and assignment laws, wherever an insolvent debtor who had committed an act of bankruptcy had placed his assets in the hands of the assignee acting by State Law under the direction of the Probate Court. It is generally true that, as between courts of concurrent jurisdiction, the Court which first obtains possession of the res must retain possession of it until the res has been finally disposed of, and anyone else interested in the res must apply to that Court if he desires relief with respect to the property in the possession of that Court. But, as between District Courts sitting in bankruptcy and State Courts for the administration of insolvent estates, there is no concurrent jurisdiction. The Constitution of the United States, by giving to Congress the power to pass uniform bankruptcy laws, gives to the Courts in which Congress shall vest this power paramount jurisdiction in bankruptcy proceedings." (Mr. Chief Justice Taft, then a judge of the Circuit Court of Appeals of the Sixth Circuit, in *Leidigh Carriage Company* v. *Stengel,* 95 Fed. 637.)

Isaacs v. *Hobbs, etc., Co.,* 282 U. S. 734.

In considering the present Frazier-Lemke Act it was said, in *United States National Bank* v. *Pamp,* 83 F. (2d) 493 (C. C. A. 8th, 1936):

"Recognizing the paramount power of Congress to enact bankruptcy legislation we hold that prior juris-

diction of the property and even the entry of a decree of foreclosure, would not prevent Congress from enacting bankruptcy legislation which would subject the property to the exclusive control and jurisdiction of the bankruptcy court."

The Federal Bankruptcy Act suspends or supersedes any conflicting state statutes. This is entirely consistent with Article VI of the United States Constitution:

> "This constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the constitution or laws of any state to the contrary notwithstanding."

The Frazier-Lemke Act is a Uniform Law on the Subject of Bankruptcies.

It has been occasionally argued that the Frazier-Lemke Act is not a uniform law on the subject of bankruptcies as required by the Constitution. It seems well settled by this time that the uniformity required is geographical uniformity. The Act certainly is not vulnerable to attack on the ground that it applies only to farmers and to agricultural property.

In *Leidigh Carriage Co.* v. *Stengal*, 95 Fed. 637, 647, Judge Taft said:

> "In our judgment, the power given to Congress in section 8 of Article I, 'to establish uniform laws on the subject of bankruptcies throughout the United States' imposes no limitation upon Congress as to the classification of persons who are to be affected by such laws provided only the laws shall have uniform operation throughout the United States."

The argument against the Frazier-Lemke Act is based on paragraph (6) of the Act.

> "(6) This Act is hereby declared to be an emergency measure and if in the judgment of the court such emergency ceases to exist in its locality, then the court, in its discretion, may shorten the stay of proceedings herein provided for and proceed to liquidate the estate."

It is claimed that the operation of this section may result in the Frazier-Lemke Act being in force in one jurisdiction while it is not in force in another jurisdiction because of a judge having declared the emergency to have ceased in his locality.

The courts, however, have held that an act is not lacking in uniformity because it recognizes diverse exemption laws in various states. 1 Remington, Bankruptcy (1934) par. 5.

The uniformity required is that the same act be enacted as applicable to all the United States. The fact that its effect varies in different states because of local law or conditions is not material. *Hanover National Bank* v. *Moyses*, 186 U. S. 181; *Leidigh Carriage Co.* v. *Stengel, supra.*

> "Notwithstanding this requirement as to uniformity the bankruptcy acts of Congress may recognize the laws of the state in certain particulars, although such recognition may lead to different results in different states. For example, the Bankruptcy Act recognizes and enforces the laws of the states affecting dower, exemptions, the validity of mortgages, priorities of payment and the like. Such recognition in the application of state laws does not affect the constitutionality of the Bankruptcy Act, although in these particulars the operation of the Act is not alike in all the States." *Stellwagen* v. *Clum*, 245 U. S. 605, 612.

In respect to uniformity the power given to a judge to declare the emergency no longer existing in his locality

should not be regarded as substantially different from varying state laws relating to exemptions, dower, etc.

> "We * * * hold that the system is, in the constitutional sense, uniform throughout the United States, when the trustee takes in each state whatever would have been available to the creditors if the Bankrupt Law had not been passed. The general operation of the law is uniform although it may result in different particulars in different states." *In re Deckert,* 2 Hughes 183, Fed. Cas. No. 3728.

It is submitted that the Frazier-Lemke Act substantially complies with the above test.

Even Though Clause (6) of the Frazier-Lemke Act is Held Unconstitutional it Can be Severed from the Rest of the Act.

While we maintain that there can be no question as to the constitutionality of clause (6) of the Frazier-Lemke Act on the grounds that it prevents the Act from being uniform, should the Court find said clause invalid it can sever this clause from the rest of the Act.

Where part of an act is found unconstitutional, the provisions of that part may be disregarded, while full force and effect is given to those parts not repugnant to the Constitution. *Bank of Hamilton* v. *Dudley,* 2 Pet. 492; *Florida C. R. Co.* v. *Schutte,* 103 U. S. 118; *Poindexter* v. *Greenhow,* 114 U. S. 270; *Baldwin* v. *Franks,* 120 U. S. 678; *Eilenbecker* v. *Dist. Ct.,* 134 U. S. 31; *Pollock* v. *Farmers' Loan and Trust Co.,* 158 U. S. 601; *Dorchy* v. *Kansas,* 264 U. S. 286.

When the Court can clearly see that it would be the intent of the legislature to have the valid part of a statute stand even though a section is invalid, the invalid section may be separated from the rest of the act. *Pollock* v. *Farmers' Loan and Trust Co.,* 158 U. S. 601.

The essential element seems to be a clear indication of legislative intent that the invalid section should not invalidate the whole Act, and the ability of the valid part to stand and have effect separate from the invalid part. *Dorchy* v. *Kansas*, 264 U. S. 286.

Such an intent of the legislature is clear in this case. The clause in question was enacted merely as a possible aid to constitutionality. It is not present in the first Frazier-Lemke Act. It is modeled on a similar clause in the Minnesota Moratorium Act considered by this Court in *Home Building and Loan Ass'n* v. *Blaisdell*, 290 U. S. 298.

We submit that according to the above decisions clause (6) of Subsection (s) of Section 75 of the Bankruptcy Act is territorially uniform, but if the Court should disagree with our contention then we have no objection to it holding clause (6) void. This clause was put into the Act after considerable debate before the Senate Judicial Committee of the Whole and was put in in order to comply, as that Committee thought, with some of the suggestions made by this court in the *Blaisdell* case. This section does not affect any part of the rest of the act and certainly can be held void without affecting the constitutionality of the act.

Consideration of Cases Holding Frazier-Lemke Act Unconstitutional.

The leading cases except for the present case opposed to the validity of the Frazier-Lemke Act are *LaFayette Life Insurance Co.* v. *Lowmon*, 79 F. (2d) 887, and *United States National Bank of Omaha* v. *Pamp*, 83 F. (2d) 493.

Lowmon Case.

In the *Lowmon* case the Circuit Court of Appeals of the 7th Circuit held the new Frazier-Lemke Act unconstitutional. But we submit that the decision is erroneous. *The*

fact is that in that case the Court misconceived its authority and power under the Act and held the Act unconstitutional because of something that is not in the law. In that case the bankrupt had filed his petition under Subsection (s) of the original Frazier-Lemke Act. During the interval that this Court held that Act unconstitutional and the enactment of the new Act, *the petitioner's right of redemption* had expired. Consequently the petitioner had no further legal title or interest in the property and the Court should have decided that case by a proper construction of the Act rather than holding it unconstitutional. (See *In re Allison,* Eastern District of Illinois, decided February 25, 1935, Page 1918 Commerce Clearing House Bankruptcy Law Service, in which District Judge Wham refused to follow the decision of the Circuit Court in the *Lowmon* case on the grounds stated above.)

The Circuit Court of Appeals of the 7th Circuit in its opinion conceded that the new Act complies with three of the five so-called property rights recognized in the law of Kentucky in the *Radford* case. That is, right Nos. 1, 2 and 4 on page 17 of the opinion, but erroneously contends that the new Act does not comply with right Nos. 3 and 5.

In the first place let us suggest that the Court erred in assuming that this Court held the original Frazier-Lemke Act unconstitutional for any one or more of these so-called Kentucky rights. *The Court does not so state in its final conclusion.* All that the Court finally decided in the *Radford* case was that the Act was void because it contravenes the 5th Amendment.

In referring to the basis of the Blaisdell decision the Circuit Court said in the Lowmon decision:

> "It was rather in the nature of the police power which states alone may exercise and which the United States has never had." (Citing *Hamilton* v. *Kentucky Distilleries,* 251 U. S. 156.) "Therefore, if the federal

statute here in question cannot be upheld under the Bankruptcy power, it is invalid."

We believe that the police power of the Federal Government within its delegated powers, among them the bankruptcy power, is fully recognized.

Pamp Case.

In the *Pamp* case the Circuit Court of Appeals of the 8th Circuit follows very largely the erroneous reasoning of the *Lowmon* case. It quotes that decision with approval. In the *Pamp* case the court erroneously construes and misinterpretates and, in fact, misreads Subsection (s) of Section 75 of the Bankruptcy Act. Everything that the court says in favor of its decision holding Subsection (s) unconstitutional, could be said with equal force and more against Section 77 and 77B.

The learned Judge writing the opinion in the *Pamp* case seems to have forgotten that he was construing an Act of Congress passed under a grant of power under the Bankruptcy clause of the Constitution. He attempts to make a distinction between the Federal statute and the State statute in the *Blaisdell* case, but fails utterly to state a single difference, except his own erroneous conclusion, as to what Subsection (s) means. We respectfully ask this Court to read Subsection (s) and then the opinion in the *Blaisdell* case and we think that it will agree with us that the facts as stated and the conclusions drawn in the *Pamp* case are unwarranted, both as to facts and conclusions of law based thereon.

For instance, the Court in the Pamp opinion complains because under the new Frazier-Lemke Act the tax and upkeep on the property are paid first out of the rental. That is exactly the same as in the *Blaisdell* case which was upheld by this Court. If a State can pass that kind of a statute without a Federal grant, in face of the contract clause

in the Federal Constitution, then surely the Federal Government can pass a similar Act under the grant of power in the Bankruptcy clause.

We have already shown that the decision in the *Lowmon* case was not necessary under the facts, nor based upon sound conclusions of law. The *Pamp* case is largely based upon the *Lowmon* case. Both of these decisions misconceive and misconstrue the new Frazier-Lemke Act. The arguments made in both of these cases could have been made with equal force and were made when the Bankruptcy Act was originally passed years ago.

In discussing the doctrine of the *Blaisdell* case the Court said:

> "The power of the state to enact such legislation was found to rest on the police power reserved to the states. *Such police power,* however, *does not rest in the Federal Government.*"

The Court then cites the *Lowmon* case and *Hamilton* v. *Kentucky Distilleries* as authority for this conclusion that the Federal Government has no police power.

A criticism of the Lowmon decision which appeared in 30 Illinois Law Review, 795, February, 1936 is equally applicable to the Pamp decision. This criticism said:

> "There is some indication that the court may have confused the issue of power under the bankruptcy clause with that of due process * * * The new act has modified the 'scaling down' features of the earlier law, has recognized the creditor's right to realize upon his security by judicial sale, and has patterned the moratoria provisions after the state statute approved by the Supreme Court in the *Blaisdell* case. It would seem that if there is power in Congress to regulate the relationship after final decree, the present act satisfies the due process requirement of reasonableness with respect to the disposition of the creditor's rights. Certainly the rights of the mortgagee are no more ad-

versely affected than the corresponding rights of bondholders under Section 77, which the Supreme Court has held to be a constitutional exercise of the bankruptcy power."

The opinion, both in the *Lowmon* case and in the *Pamp* case, is based upon an erroneous interpretation of Subsection (s) of Section 75 and of the decision of this Court in the *Radford* case. It seems that the Court of Appeals in both of these cases assumes that state laws, state decisions and state procedure and remedies are the supreme law of the land rather than an act passed by Congress under a constitutional grant of power. In order to arrive at the erroneous conclusion, the Court, in both of these cases, disposes of the *Blaisdell* case on the grounds of state police power and then erroneously assumes that the Federal Government has no such power.

The Court in both of these cases seems to forget that when necessary, *to exert the police power in the exercise of a delegated power, the police power of the federal government, as to the delegated power, is plenary.* We have heretofore discussed the police power of the federal government and shall not repeat it here.

The Decision Below.

In this case the Circuit Court of Appeals below abandoned its splendid and logical reasoning in the case of *Bradford* v. *Fahey,* 76 F. (2d) 628. It did this because it misinterpreted this Court's opinion in the *Radford* case, 295 U. S. 555.

The Circuit Court of the Fourth Circuit in the case at bar, the same as the Circuit Court of the Eighth Circuit in the *Pamp* case, 83 F. (2d) 493, and the same as the Circuit Court of the Seventh Circuit in the *Lowmon* case, 79 F. (2d) 887, assumes that the *Radford* case holds that State laws, State remedies, and State procedure, are superior to

or supercede Federal laws enacted by Congress under a grant of power under the Constitution. We submit such is not the holding in the *Radford* case. Such is not the law, but the reverse is the law. Acts of Congress enacted under the Constitution supercede State laws, remedies and procedure, and supercede even State constitutions and State decisions that are in conflict therewith.

In construing section 75 of the Bankruptcy Act of 1898, including subsection (s), the new Frazier-Lemke amendment, *the courts must be guided by the language of the Act, and not by the over-zealous statements of counsel, who read something into the Act that is not there.* As an Act of Congress, it is entitled to the greatest respect and the most careful and painstaking consideration by this Court. *It is presumed to be constitutional. The burden of proof rests upon those assailing its constitutionality. If the Act is susceptible of two constructions, one constitutional and the other unconstitutional, then it is the duty of the Court to hold it constitutional.*

This Act must not be confused with State acts. It is an Act passed by the Congress of the United States on the subject of bankruptcy—passed under the grant of power given it by the Federal Constitution. "Congress shall have power * * * to establish * * * uniform laws on the subject of bankruptcy throughout the United States", and "to make all laws which will be necessary and proper for carrying into execution the foregoing powers, and all other powers, vested by this Constitution in the Government of the United States, or in any department or officer thereof." (U. S. Constitution, Art. I, par. 8.) Again,

"This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, *shall be the supreme law of the land; and the judges in every State shall be bound thereby, any thing in*

the Constitution or laws of any State to the contrary notwithstanding'' Article VI.

On the subject of bankruptcy, *the Constitution vests full and complete, not only partial, legislative power in Congress. Any State law must give way to the national law. That is the mandate of the Constitution.* There is no limitation on this power, save and except such as may be found in the Fifth Amendment. "No person shall * * * be deprived of life, liberty or property without due process of law." It is conceded by all that a person may be deprived of his life, liberty or property by due process. The question is: What is "without due process"? No final definition of this has, or perhaps ever will be, given. Generally the courts have, in effect, held that the Act must not be so unwarranted, arbitrary, and unreasonable as to shock one's conscience. (*Hanover National Bank* v. *Moyses,* 186 U. S. 181; *State* v. *Superior Court of King County,* 45 L. R. A. 177; *Sturges* v. *Crowninshield,* 4 Wheat. 122.)

The Hon. Judge Parker, who wrote the opinion in the case at bar, also wrote the opinion in the case of *Campbell* v. *Alleghany Corporation,* 79 F. (2d) 947. In that case the reasoning and the conclusions reached by the court in holding Section 77B of the Bankruptcy Act constitutional are diametrically opposite from the reasoning and conclusions reached in holding the new subsection (s) of Sec. 75 unconstitutional in the case at bar. In the *Campbell* case the Hon. Judge Parker states in his opinion:

> "We entertain no doubt as to the constitutionality of the statute. It is an exercise of the power conferred on Congress by Art. I, Sec. 8, Clause 4 of the Constitution, 'to establish * * * uniform laws on the subject of bankruptcies throughout the United States', adapted to the conditions presented by modern industrial organization. Prior to the passage of the act, neither proceedings under the old bankruptcy laws nor receiverships in equity furnished adequate relief for dis-

tressed corporate debtors, their creditors and stockholders, under modern conditions. * * * Proceedings under the old bankruptcy laws were inadequate because no machinery existed to scale down secured debts without a sale of the security; and a sale almost necessarily resulted in a sacrifice of the property at an inadequate price because of the lack of persons in a position to bid for it. If forced to sale, it was frequently, if not generally, bought in by a committee of bondholders at the inadequate prices which forced sales notoriously yield, with the result that non-assenting bondholders received little and stockholders nothing at all. * * * Only by the further exercise of the bankruptcy power of Congress could adequate relief be afforded these distressed corporate debtors and their creditors; and the act in question was passed for the purpose of affording this relief."

* * * * * * *

"The grant of power to Congress to establish uniform laws on the subject of bankruptcies is not limited to the forms in which that power has heretofore been exercised by Congress or by the laws relating to bankruptcy which had been enacted in England or in the several American colonies prior to the adoption of the Constitution. See article by Prof. Gerdes in XII New York University Law Quarterly Review 198, and article by Jacob J. Kaplan, vol. XXI American Bar Association Journal p. 47, for a history of these acts. All phases of the relationship between a debtor financially embarrassed and his creditors is brought under the control of Congress by the constitutional grant of power; and the fact that a particular mode has hitherto been employed in dealing with this relationship is not to be taken as a measure of the power over it. *Hanover Nat. Bank* v. *Moyses,* 186 U. S. 181; *Sturges* v. *Crowninshield,* 4 Wheat. 122; *In re Landquist* (C. C. A. 7th) 70 Fed. (2d) 929; *In re Klein,* Fed. Cas. No. 7865 reported as note to *Nelson* v. *Carland,* 1 How. 265, 277; *In re Reiman,* 7 Ben. 455, Fed. Cas. No. 11,673; *Kunzler* v. *Kohaus,* 5 Hill 317. As said in Story on the Con-

stitution, Sec. 1113, quoted in *In re Reiman, supra:* 'Perhaps as satisfactory a description of a bankrupt law as can be framed is that it is a law for the benefit and relief of creditors and their debtors in cases in which the latter are unable or unwilling to pay their debts. And a law on the subject of bankruptcies, in the sense of the Constitution, is a law making provision for cases of persons failing to pay their debts.'

And, as pointed out by the Circuit Court of Appeals of the Seventh Circuit in *In re Landquist, supra,* inability to pay (except under the act of 1867) has always been recognized in this country as entitling a debtor to the benefit of the bankruptcy acts 'whether that inability were caused by a lack of assets or a lack of liquidity of assets.' Certainly, the act here in question is for the relief of corporate debtors who are unable to pay and their creditors, and falls well within the purpose of the constitutional grant of power.''

* * * * * * *

''Little need be said as to the question which arises under the Fifth Amendment. There is no question, of course, but that the exercise of the bankruptcy power by Congress, as is the case with other delegated powers, is subject to the requirement of due process contained in that amendment. *Monongahela Nav. Co.* v. *U. S.,* 148 U. S. 312, 336; *Hanover Nat. Bank* v. *Moyses, supra,* 186 U. S. 181, 192. But as any exercise of the bankruptcy power impairs the obligation of contracts, such impairment is not to be taken as in itself a denial of due process. For the provisions of the act to violate the amendment, they must be so grossly arbitrary and unreasonable as to be 'incompatible with fundamental law.' *Hanover Nat. Bank* v. *Moyses, supra.* We do not think that the requirement that secured creditors scale their debts in accordance with a plan which two-thirds of them are willing to accept and which has been approved by the court as reasonable and fair, and accept in lieu of payment in money such securities as are specified in the plan, can be said to be such an arbitrary and unreasonable exercise of

the bankruptcy power as to amount to a denial of due process.

"The fact that secured debts are affected by the act does not, of course, raise any grave constitutional question, and can be dismissed with brief comment. 'A secured debt or lien is, so far as the Constitution of the United States is concerned, a no more sacred kind of property than an unsecured debt, * * * and the Constitution expressly permits and grants to Congress the power to affect such property, whether it be an unsecured debt or whether it be a lien, by laws relating to the subject of bankruptcies.' *In re Burgh*, 7 Fed. Supp. 184, 185.

"As a matter of fact, no property in any real sense is taken from the dissenting creditor when he is compelled under 77b to scale his claim and accept securities in lieu thereof. The securities held by him have already shrunk in value before the proceeding under the act is instituted; and all that is required of him is that he face reality and accept his pro rata interest in the debtor's property in a form which will not jeopardize the rights of other creditors similarly situated. * * * and, when the situation is viewed realistically, it is readily seen that he is not required to surrender any part of the value either of his securities or of the property available for the payment of his claim."

* * * * * * *

"Doubts as to the validity of Section 77b are based very largely upon the fact that the relief which it provides for embarrassed corporations, their creditors and stockholders, has not heretofore existed under the laws of this country, and for that reason seems novel and questionable. It must be remembered, however, that the power granted Congress over the subject of bankruptcies is plenary, and that in its exercise Congress is not limited by what has been attempted in the past but may shape its remedies in a way to meet adequately the problems of the present. Like other constitutional grants of power, that giving Congress power over bankruptcies is to be interpreted, not in the light of the

conditions with which the framers of the Constitution were familiar, but of what is required under modern conditions to deal adequately with the relationship existing between embarrassed debtors and their creditors. As said by Chief Justice Hughes in *Home Building & Loan Association* v. *Blaisdell,* 290 U. S. 398, 442, 'If by the statement that what the Constitution meant at the time of its adoption it means today, it is intended to say that the great clauses of the Constitution must be confined to the interpretation which the framers, with the conditions and outlook of their time, would have placed upon them, the statement carries its own refutation. It was to guard against such a narrow conception that Chief Justice Marshall uttered the memorable warning—"We must never forget that it is a constitution we are expounding" (*McCulloch* v. *Maryland,* 4 Wheat. 316, 407)—"a constitution intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs." Id., p. 415. When we are dealing with the words of the Constitution, said this Court in *Missouri* v. *Holland,* 252 U. S. 416, 433, "we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. * * * The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago".' "

We believe that the Circuit Court's reasoning and conclusions in the *Campbell* case are correct and that its reasoning and conclusions in the case at bar are erroneous. We arrive at this conclusion because this Court, after its decision in the *Radford* case, holding the original Subsection s of Section 75 of the Bankruptcy Act unconstitutional, denied, on October 15, 1935, a writ of certiorari in the Campbell case. This we feel was equivalent to confirming the decision of the Circuit Court holding Section 77B constitutional, and is in line with this Court's decision in hold-

ing Section 77 of the Bankruptcy Act constitutional in the *Rock Island* case.

As is shown by the decisions in the *Rock Island* case and in the *Campbell* case, a secured creditor's rights are no more sacred, under the constitution, than an unsecured creditor's. The encumbered property does not belong to the mortgagee, but to the mortgagor. The mortgagee is not entitled to the property, but to its value. That is the long settled law in this country. Any legislation that provides for a judicial determination of the value of the property is and always has been valid. *Conard* v. *Atlantic Inc. Co.*, 1 Pet. 386, 7 U. S. (L. Ed.) 189, 19 R. C. L. 310.

Conclusions.

This is a case in bankruptcy. The legislation in question is legislation on the subject of bankruptcy. The only farmer who can take advantage of this Act is a bankrupt farmer. A bankrupt is a financial wreck. The question of interest and profits in bankruptcy proceedings is generally out of the question. The question is one of salvaging, saving what can be saved out of the wreck. In legislating on this subject, it is just as much the duty of Congress to consider the unfortunate debtor, as to consider the unfortunate creditor.

This Act effects bankrupt farmers as defined by Section 75 of the Bankruptcy Act. *It does not apply to corporations or to absentee landlords.* The truth is that the absentee landlords are largely insurance companies, banks, mortgage investment corporations and money lenders. These cannot take advantage of this Act, but as creditors their rights are fully protected. * * * *"The rights of debtor and creditor equally entered into the mind of the framers of the Constitution." In re Klein,* 1 Howard 279.

It is true that some of the creditors will not be able to collect the face value of their mortgages or the accrued in-

terest thereon. *But that is a loss they have already sustained, not through the operation of the statute,* but through the default, in solvency and bankruptcy of their debtors. This is equally true under other sections of the Bankruptcy Act and especially true under Sections 77 and 77B.

We are aware that some courts have erroneously attempted to distinguish Sections 77 and 77B of the Bankruptcy Act from the new Subsection (s) of Section 75. There can be and is no logical distinction except that Sections 77 and 77B are far more drastic than Section 75, including the new Subsection (s). The only distinction that can be made is that Sections 77 and 77B deal with insolvent railroads and corporations and Section 75 has for its object the saving of several thousand farm homes.

The attempted distinction, that under Sections 77 and 77B a majority or two-thirds of the creditors must agree, is no logical or constitutional distinction and in fact is not a correct statement of the provisions of Sections 77 and 77B. *Under those sections a reorganization can be had with a majority of the secured creditors dissenting,* provided their securities are kept intact or other reasonable provisions made to assure to them the value of their securities.

Let us get the facts straight in relation to these three Sections of the Bankruptcy Act and then we are sure that Section 75, including Subsection (s), is as constitutional as Sections 77 and 77B. What Congress can do to one-third or a majority, under the Constitution, it can do to all of the creditors. At any rate the Constitution is supposed to protect minorities and not majorities.

For the courts to hold Sections 77 and 77B of the Bankruptcy Act constitutional and then hold Subsection (s) of Section 75 unconstitutional is inconsistent. Under Sections 77 and 77B, the mortgagee's lien can be altered and changed entirely, and he can be forced to substitute in lieu of his

bonds or mortgages, bonds or stock in the same or in other corporations, or in a merger of corporations. These bonds and stocks may bear interest and may not. They may ultimately prove worthless.

The fact that two-thirds of the creditors may agree to it is not an argument in favor of its constitutionality. This is simply evidence that the reorganization is just and reasonable, upon which evidence the Court may, in its discretion, confirm or disallow the reorganization. Under the new Frazier-Lemke Act, the liens continue in full force and effect, until the property has been converted into money, and then the lien is transferred to the funds, up to the full value of the property. We submit that that is far more reasonable, and less drastic, than the provisions of Sections 77 and 77B.

Under Sections 77, 77B and 75 of the Bankruptcy Act, all contracts and obligations are merged. The court assumes full and complete jurisdiction of all of the bankrupt's property, secured or unsecured. Congress and not the court is the sole judge as to the methods and means by which the constitutional grant of power, to legislate upon the subject of bankruptcy, is to be carried out. This is proper because Congress is not restricted or limited, as are courts, to rules of evidence in ascertaining facts. It has a far wider latitude in the collection and finding of facts than the courts and for that reason courts have always upheld the acts of Congress unless they are unreasonable and unwarranted and in violation of the Constitution. *McCulloch* v. *Maryland,* 4 Wheat. 316; *Fairbanks* v. *U. S.*, 181 U. S. 283.

The amendments, the new Subsection (s), Sections 75, 77 and 77B of the Bankruptcy Act, mark a new epoch. From now on, in the interest of the public, property and wealth will be conserved in the hands of those who created it—not destroyed. The debtor will be considered as well as the creditor. The bankruptcy act is going to become an act of conservation and not an act of wreckage.

The new Frazier-Lemke Amendment to the Bankruptcy Act does not take any property from the creditors. It gives to the creditors all of the past efforts, earnings and accumulations of the debtor, his wife and his children, but it does at the same time prevent them from taking the earnings and accumulations of the debtor, his wife and his children. It deprives the creditors of nothing, but does prevent them from destroying all value by throwing more farm land and farm property upon the market and it conserves the home and property for those who created and accumulated it, subject to existing liens up to the par value as judicially determined under the provisions of the Act.

This amendment is a conservation act. Nobody loses anything—it conserves property and values. The creditors will get the present value of the property—that is all they could get before this amendment was enacted or that they are entitled to. In fact they will get more under this amendment than they ever would get by wrecking another million farm homes and destroying all values. The agricultural wealth of this nation can and will be preserved in the hands of those who created it—the farmers.

We repeat, that if Section 77 is constitutional, and the Supreme Court has held that constitutional in the case of *The Chicago, Rock Island and Pacific Railway Company*, 294 U. S. 648, then Section 75 is constitutional. If the Court will read that decision it will find that the provisions of Section 77 are far more drastic than Section 75, including the present amendment and yet the Supreme Court of the United States held that to be constitutional. We also again refer the Court to the splendid decision in the *Campbell* v. *Allegany Corporation* case. In that case the Circuit Court of Appeals of the 4th Circuit sustained the constitutionality of Section 77b and a petition for certiorari was denied this court.

The courts should not read limitations into the Constitution that do not exist. They should avoid judicial legislation, and leave Congress free to act within the constitutional grant of power. Our Constitution is a masterpiece of fundamental legislation. It was framed by our Revolutionary forefathers—the pioneers of America—able, intelligent, honorable men, who had no intention to legislate for all the future of the nation. They put nothing into that instrument that hampers and prevents progress. They made it elastic. They realized that nothing was permanent, that the nation would grow; therefore they limited the Constitution to general principles of government. They had no intention of putting hobble-skirts on Congress, and hindering progress. Their wisdom in limiting the Constitution to fundamental principles of government is clearly shown, when we realize that they lived in a different age; that they never talked on a telephone; never saw a steamboat; never rode in a train or in an automobile; never thought of an aeroplane, and never listened to a radio, nor ever dreamed of such things. Their wisdom was shown when they made the Constitution elastic—a Constitution that had within it the possibilities of the future development and growth of the nation, and its people. The Constitution was made for the people, and not the people for the Constitution.

The power of the executive, the judicial and the legislative branches of government are all derived from that same Constitution, and each of these three coordinate branches of our government must respect the power of the other, under the Constitution. "Finally, the power of this Court is not to amend, but only to expound the Constitution, as an agency of the sovereign people who made it, and who alone have authority to alter or unmake it."

As was so aptly stated by Chief Justice Hughes, in *Home Bldg. & Loan Assn.* v. *Blaisdell,* 290 U. S. 398, 443:

"It was to guard against such a narrow conception that Chief Justice Marshall uttered the memorable words: 'We must never forget that it is a constitution we are expounding.' "

Respectfully submitted,

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APPENDIX A.

The New Subsection (s) of Section 75 of the Bankruptcy Act.

"(s) Any farmer failing to obtain the acceptance of a majority in number and amount of all creditors whose claims are affected by a composition and/or extension proposal, or if he feels aggrieved by the composition and/or extension, may amend his petition or answer, asking to be adjudged a bankrupt. Such farmer may, at the same time, or at the time of the first hearing, petition the court that all of his property, wherever located, whether pledged, encumbered, or unencumbered, be appraised, and that his unencumbered exemptions, and unencumbered interest or equity in his exemptions, as prescribed by State law, be set aside to him, and that he be allowed to retain possession, under the supervision and control of the court, of any part or parcel or all of the remainder of his property, including his encumbered exemptions, under the terms and conditions set forth in this section. Upon such a request being made, the referee, under the jurisdiction of the court, shall designate and appoint appraisers, as provided for in this Act. Such appraisers shall appraise all of the property of the debtor, wherever located, at its then fair and reasonable market value. The appraisals shall be made in all other respects with rights of objections, exceptions, and appeals, in accordance with this Act: Provided, That in proceedings under this section, either party may file objections, exceptions, and take appeals within four months from the date that the referee approves the appraisal.

"(1) After the value of the debtor's property shall have been fixed by the appraisal herein provided, the referee shall issue an order setting aside to such debtor his unencumbered exemptions, and his unencumbered interest or equity in his exemptions, as prescribed by the State law, and shall further order that the possession, under the supervision and control of the court, of any part or parcel or all of the remainder of the debtor's property shall remain in the debtor, as herein provided for, subject to all existing

mortgages, liens, pledges, or encumbrances. All such existing mortgages, liens, pledges, or encumbrances shall remain in full force and effect, and the property covered by such mortgages, liens, pledges, or encumbrances shall be subject to the payment of the claims of the secured creditors, as their interests may appear.

"(2) When the conditions set forth in this section have been complied with, the court shall stay all judicial or official proceedings in any court, or under the direction of any official, against the debtor or any of his property, for a period of three years. During such three years the debtor shall be permitted to retain possession of all or any part of his property, in the custody and under the supervision and control of the court, provided he pays a reasonable rental semiannually for that part of the property of which he retains possession. The first payment of such rental shall be made within one year of the date of the order staying proceedings, the amount and kind of such rental to be the usual customary rental in the community where the property is located, based upon the rental value, net income, and earning capacity of the property. Such rental shall be paid into court, to be used, first, for payment of taxes and upkeep of the property, and the remainder to be distributed among the secured and unsecured creditors, and applied on their claims, as their interests may appear. The court, in its discretion, if it deems it necessary to protect the creditors from loss by the estate, and/or to conserve the security, may order sold any unexempt perishable property of the debtor, or any unexempt personal property not reasonably necessary for the farming operations of the debtor, such sale to be had at private or public sale, and may, in addition to the rental, require payments on the principal due and owing by the debtor to the secured or unsecured creditors, as their interest may appear, in accordance with the provisions of this Act, and may require such payments to be made quarterly, semiannually, or annually, not inconsistent with the protection of the rights of the creditors and the debtor's ability to pay, with a view to his financial rehabilitation.

"(3) At the end of three years, or prior thereto, the debtor may pay into court the amount of the appraisal of the property of which he retains possession, including the amount of encumbrances on his exemptions, up to the amount of the appraisal, less the amount paid on principal: Provided, That upon request of any secured or unsecured creditor, or upon request of the debtor, the court shall cause a reappraisal of the debtor's property, or in its discretion set a date for hearing, and after such hearing, fix the value of the property, in accordance with the evidence submitted, and the debtor shall then pay the value so arrived at into court, less payments made on the principal, for distribution to all secured and unsecured creditors, as their interests may appear, and thereupon the court shall, by an order, turn over full possession and title of said property, free and clear of encumbrances to the debtor: Provided, That upon request in writing by any secured creditor or creditors, the court shall order the property upon which such secured creditors have a lien to be sold at public auction. The debtor shall have ninety days to redeem any property sold at such sale, by paying the amount for which any such property was sold, together with 5 per centum per annum interest, into court, and he may apply for his discharge, as provided for by this Act. If, however, the debtor at any time fails to comply with the provisions of this section, or with any orders of the court made pursuant to this section, or is unable to refinance himself within three years, the court may order the appointment of a trustee, and order the property sold or otherwise disposed of as provided for in this Act.

"(4) The conciliation commissioner, appointed under subsection (a) of section 75 of this Act, as amended, shall continue to act, and act as referee, when the farmer debtor amends his petition or answer, asking to be adjudged a bankrupt under the provisions of subsection (s) of section 75 of this Act, and continue so to act until the case has been finally disposed of. The conciliation commissioner, as such referee, shall receive such an additional fee for his services as may be allowed by the court, not to exceed $35 in any case, to be paid out of the bankrupt's estate. No additional fees or costs of administration or supervision of any kind

shall be charged to the farmer debtor when or after he amends his petition or answer, asking to be adjudged a bankrupt, under subsection (s) of section 75 of this Act, but all such additional filing fees or costs of administration or supervision shall be charged against the bankrupt's estate. Conciliation commissioners and referees appointed under section 75 of this Act shall be entitled to transmit in the mails, free of postage, under cover of a penalty envelope, all matters which relate exclusively to the business of the courts, including notices to creditors. If, at the time that the farmer debtor amends his petition or answer, asking to be adjudged a bankrupt, a receiver is in charge of any of his property, such receiver shall be divested of possession, and the property returned to the possession of such farmer, under the provisions of this Act. The provisions of this Act shall be held to apply also to partnerships, common, entirety, joint, community ownerships, or to farming corporations where at least 75 per centum of the stock is owned by actual farmers, and any such parties may join in one petition.

"(5) This Act shall be held to apply to all existing cases now pending in any Federal court, under this Act, as well as to future cases; and all cases that have been dismissed by any conciliation commissioner, referee, or court because of the Supreme Court decision holding the former subsection (s) unconstitutional, shall be promptly reinstated, without any additional filing fees or charges. Any farm debtor who has filed under the General Bankruptcy Act may take advantage of this section upon written request to the court; and a previous discharge of the debtor under any other section of this Act shall not be grounds for denying him the benefits of this section.

"(6) This Act is hereby declared to be an emergency measure and if in the judgment of the court such emergency ceases to exist in its locality, then the court, in its discretion, may shorten the stay of proceedings herein provided for and proceed to liquidate the estate.

Approved, August 28, 1935.

FILED
DEC 11 1936
CHARLES ELMORE CR
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 530

ROBERT PAGE WRIGHT, BANKRUPT, *Petitioner*

vs.

VINTON BRANCH OF THE MOUNTAIN TRUST BANK OF ROANOKE, VIRGINIA AND A. C. HARRIS, *Trustee*

BRIEF IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

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To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States

1

Statement of Matter Involved

The sole question presented by the debtor's petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit is the constitutionality of the Frazier-Lemke Act, which is Subsection (s) of Section 75 of the National Bankruptcy Act, as amended by the Act of Congress on August 28, 1935. (49 Stat. 942; 11 U. S. C. A. 203 [s]). As the record will disclose, the Circuit Court of Appeals of the United States for the Fourth Circuit, by a unanimous decision, declared this Act unconstitutional, their opinion being set forth in full in the record in this case.

Attention is likewise called to the record in this suit for the indebtedness of the petitioner as compared to his assets as shown by the schedule on pp. 4 and 5 of the record, the total value of his assets being $2,882.50 as compared to a total indebtedness of $6,559.50. The principal amount of the secured claims of $5,797.80 shown in Schedule A constitutes the debt the petitioner owes to respondent in this suit.

2

Rights of a Deed of Trust Creditor under the Virginia Statute

By the Statutes of Virginia (Acts of the General Assembly of Virginia of 1926, 324, p. 591, *et seq.*, entitled "An Act to amend and re-enact Section 5167 of the Code of Virginia, relating to deeds of trust," and approved March 24, 1926) it is among other things provided:

> "Every deed of trust to secure debts or indemnify sureties, except so far as may be therein otherwise provided, shall be construed to impose and confer upon the parties thereto, and the beneficiaries thereunder, the following duties, rights and obligations, in like manner as if the same were expressly provided for by such deed of trust, namely:
> * * *
>
> "(6th) In the event of default in the payment of the debt secured, or any part thereof, at maturity, or in the payment of interest when due, or of the breach of any of the covenants entered into or imposed upon the grantor, then at the request of any beneficiary the trustee shall forthwith declare all the debts and obligations secured by the deed of trust at once due and payable, shall take possession of the property and proceed to sell the same at auction at the premises (or at such other place as the trustee may select) upon such terms and conditions as the trustee may deem best, after first advertising the time, place and terms of sale in such manner as the deed may provide, or, if none be provided, then in such reasonable manner as the trustee may elect, no notice to the grantor or his successor in title being required."

These and cognate provisions are contained in Section 5167 of the Code of Virginia. They embody enlargements of the

State's deed of trust statutes that have existed for scores of years, and so generally have they been followed in practice that a mortgage is a rarity in Virginia. When a sale is made by the trustee—a third person—it is absolute, and no confirmation by any court is required, and there is no right of redemption.

In the opinion "In re Sherman, 12 Fed. Supp. 297, the learned Judge of the District Court for the Western District of Virginia said of the Virginia Statute in considering the constitutionality of the Frazier-Lemke Act here under consideration:

> "We may assume that the provision of the new Frazier-Lemke Act compelling an ultimate public sale of the property upon request of any secured creditor protects certain of the rights which were taken away by the old act; namely, the first, second, and fourth of the rights set out in the opinion in the Radford Case. But even if this be true, it seems clear that the amended act, equally with the original, threatens those rights which the Supreme Court enumerated as 3 and 5. These are in substance the right to determine when a sale shall be held and the right to control the property during default, pending the sale. In the Radford Case it was said that the creditor possessed these rights under the Kentucky law, subject only to the discretion of the court. In Virginia, the same rights exist in more absolute form, for their exercise is not subject to the discretion of any court, unless, it may be, they were exercised in such an oppressive or wasteful manner as to constitute a fraud upon the rights of the debtor and thereby call for restraint by the court in an independent suit instituted for that purpose.
>
> It will be noticed that in Virginia the trustee takes possession of the property following default, and thereafter sells the property at such time and place and upon such terms and conditions as he sees fit. It seems clear that the right to determine when a sale shall be held and the right to control the property pending a sale are abrogated by the Frazier-Lemke Act, even since its amendment. That act specifically provides that possession of the property shall remain in the debtor, and that all proceedings shall be stayed for a period of three years. That these provisions are subject to compliance with conditions imposed by the court does not lessen the fact that they take away rights previously vested in the creditor.

> The most that can be said is that the amended act preserves the right to retain the lien until the debt is paid, and to that end provides for a public sale at which the creditor himself may bid, and by bidding may, if necessity arises, take over the property itself. But the right to compel such a sale is delayed for a period of three years or until such time within that period as the debtor may determine by offering to pay the appraised value of the property. The property remains in possession of the debtor subject only to such supervision as to its handling as a court may be able to give and subject to the payment of a reasonable rental. During this period the value of the property may decrease while the indebtedness increases through accumulated interest. The first installment of rent is not payable until the end of one year, so that for at least a year the creditor must sit by while his debt accumulates with no assurance that at the end of that time the debtor will be able to fulfill the obligations imposed upon him, or that he will not deliberately fail to do so."

The above opinion by the learned District Court so precisely penetrates to the heart of the consideration of the constitutionality of this Act that further precision in the definition of the matter involved would not seem to be necessary. It should, however, be pointed out that this court has from time to time very definitely settled the proposition that the title and modes of disposition of real property within the various states are not matters placed under the control of Federal authority. (United States *vs.* Fox, 94 U. S. 315)

And this Honorable Court, by its unanimous opinion, in Louisville Joint Stock Land Bank *vs.* Radford (295 U. S. 555; 55 Supreme Court 854; 79 L. Ed. 1593; 97 ALR 1106) explicitly held that the first Frazier-Lemke Amendment wrongfully took from the lien creditor five definite property rights recognized by the law of Kentucky; and among these five property rights, described as "substantive rights in specific property acquired by the Bank prior to the Act," were the following that the Virginia statute provides for deed of trust creditors, viz.:

> "(2) The right to determine when such sale shall be held, subject only to the discretion of the court," and

"(5) The right to control meanwhile the property during the period of default, subject only to the discretion of the court, and to have the rents and profits collected by a receiver for the satisfaction of the debt."

In comparing the position of the creditor with regard to his rights given him by the law of the State of Virginia as compared to the modification thereof by the Act under consideration, it is quite evident that this Act would take from the creditor not only substantial rights, but would give the creditor an investment that no rational investor would voluntarily make.

As Judge Paul forcibly points out in his opinion cited above, these property rights of the creditor under the Kentucky law are subject to the discretion of the court, but in Virginia they are absolute in form, because they may be enjoyed and exercised without the intervention of the court—the Virginia statute expressly providing that in event of default of the debtor, then, at the request of any beneficiary, the trustee shall forthwith declare all the debts secured by the deed of trust at once due, and shall take possession of the property and proceed to sell the same, no notice to the grantor or his successors in title being required.

This court has in numerous cases held that the law of the state in which lands are located are controlling upon it in respect of the validity and effect of mortgages and the transfer of title to real estate, and the decisions of state courts have been followed by federal courts concerning these rights in bankruptcy proceedings even to the extent of rejecting the latter court's own directly contrary ruling. (Cox *vs.* Wallace, 219 Fed. 126; Babbitt *vs.* Read, 236; Remington on Bankruptcy, 4th Ed., p. 1405.)

The petitioner largely relies on the Blaisdell case (290 U. S. 398) and the Kavanaugh case (295 U. S. 56)—both of which were considered by this court in the Radford case (supra), and the act of Minnesota involved in the first-named case was upheld upon the ground that the Minnesota statute was a reasonable exercise of the police or reserve power of that state; and

the act of Arkansas in the second-named case being stricken down because of its being an unreasonable exercise of that state's police or reserve power.

The weakness of the citation in the Blaisdell case (supra) scarcely needs to be pressed beyond pointing out that this was state legislation in the exercise of its police power, which the states alone may exercise, and was in no sense an exercise of the bankruptcy power which the states do not have. It would most certainly be defective reasoning to say that Congress, under the bankruptcy clause, could pass the same legislation as a state may pass under such powers as emanate from the residuary powers of the states and as restricted by the contract clause in the Federal Constitution. Even in this situation, this case holds that such relief must be appropriate to the emergency and be based upon reasonable conditions. The danger of this analogy is brought to the forefront when it is remembered that economic conditions may enlarge the police powers of the state, and while it may be the occasion of the exercise of delegated powers to Congress, it cannot enlarge upon those powers. (Wilson *vs.* New, 243 U. S. 332.)

The Kavanaugh case (supra) holds in brief that legislation is unconstitutional which changes the remedies available for the enforcement of the mortgage, which changes are made in a spirit of repression or without moderation or reason. Mr. Justice Cardozo, in his opinion, points out that statutes cannot be passed making the remedy of the lienor a shadow and states that not even changes of remedy may be pressed so far as to cut down the security of a mortgage without moderation or reason. Finding the Arkansas statute involved in that case in conflict with the contract and due process clauses of the Federal Constitution, there is no principle enunciated in this case that could possibly support the Act under consideration.

The petitioner also quotes extensively from the decision of this Honorable Court in the case of Continental Illinois National Bank & Trust Company of Chicago *vs.* Chicago, Rock Island & Pacific Railway Company, *et als.* (294 U. S. 648), wherein was considered the constitutionality of Section 77 of

the Bankruptcy Act relating to the re-organization of railroads engaged in interstate commerce. In that case the railroad company filed a petition seeking a re-organization, and in aid of the jurisdiction of the court, the lienholders of certain securities were enjoined from selling such securities. That injunction was in aid of a proceeding then pending and to afford time for the preparation and confirmation of a plan of re-organization. Further provisions of the Act under which the proceeding was instituted require that the plan of re-organization shall not be finally approved by the Commission until it has been accepted in writing and such acceptance has been filed in the proceeding by or on behalf of creditors holding two-thirds in amount of the claims of each class whose claims or interests would be affected by the plan, and by or on behalf of stockholders of the debtor holding two-thirds of the stock of each class, etc. And this court in the Radford case considered and distinguished its opinion in the case of Continental Illinois N. B. & T. Co. against C. R. I. & P. Railway, and had the following to say of the provisions of the Frazier-Lemke Act then in question:

> "Nor do the provisions of the bankruptcy acts concerning compositions afford any analogy to the provisions of Sec. 7. So far as concerns the debtor, the composition is an agreement with the creditors in lieu of a distribution of the property in bankruptcy—an agreement which 'originates in a *voluntary acceptance by his creditors.*' (Citing cases) So far as concerns dissenting creditors, the composition is a method of adjusting among creditors rights in property in which all are interested. In ordering the adjustment, the bankruptcy court exercises a power similar to that long exercised by courts of law (citing cases), and of admiralty (citing cases). It is the same power which a court of equity exercises when it compels dissenting creditors, in effect, to submit to a plan of re-organization approved by it as beneficial and assented to by *the requisite majority of the creditors* (citing cases). In no case of composition is a secured claim affected except when the holder is a member of a class; and then only when the composition is desired by the requisite majority and is approved by the court. Never, so far as appears, has any composition affected a

secured claim held by a single creditor. Compositions are comparable *to the voluntary adjustment with the mortgagee* provided for in Sec. 3 of the Frazier-Lemke Amendment. They are *not analogous to the* so-called adjustment *compelled* by Sec. 7." (Italicised for emphasis.)

By Section 7 of the first Frazier-Lemke Act (held unconstitutional in the Radford case) if a secured creditor objects to the manner of payments and distribution of the debtor's property as provided by that Act, then after setting aside the debtor's exemptions as prescribed by state law, the court was required to stay all proceedings for a period of five years and during which five years the debtor shall retain possession of all or any part of his property, under the control of the court, provided he pays a reasonable rental annually for that part of the property of which he retains possession; the first payment of such rental to be paid within six months of the date of the order staying proceedings, such rental to be distributed among the secured and unsecured creditors, as their interests may appear, etc.

Under the present Frazier-Lemke Act (August 28, 1935), any farmer failing to obtain acceptance of a majority in number and amount of his creditors may, after having certain state exemptions set aside to him, have the referee enter an order "that the possession, under the supervision and control of the court, of any part or parcel or all of the remainder of the debtor's property, shall remain in the debtor, as herein provided for, subject to all existing mortgages, liens, pledges, or encumbrances, * * *, and "When the conditions set forth in this section have been complied with, the courts shall stay all judicial or official proceedings of any court, or under the direction of any official, against the debtor or any of his property, for a period of three years. During such three years the debtor shall be permitted to retain possession of all or any part of his property in the custody and under the supervision and control of the court, provided he pay a reasonable rental semi-annually for that part of the property of which he retains possession. The first payment of such rental shall be made

within one year of the date of the order staying proceedings, the amount and kind of rental to be the usual customary rental in the community where the property is located, based on the rental value, net income, and earning capacity of the property. Such rental should be paid into the court to be used, first, for payment of taxes and upkeep of the property, and the remainder to be distributed among the secured and unsecured creditors, and applied on their claims as their interest may appear."

The present statute, it will be seen, changes the period of the debtor's possession, on condition that he pays rental, from five years to three years, but under the present statute the debtor has one year in which to make his first rental payment, while under the former statute he was required to make his first rental payment in six months, and under the present statute the first rentals are applicable to the payment of taxes and upkeep of the property, while under the former statute the rental was distributable among the secured and unsecured creditors according to their interest. Under the Virginia statute quoted above the creditor had the right immediately upon default to have the trustee take possession and to the revenues therefrom thereafter from a solvent tenant; but under this new Act, the bankrupt debtor has the right to retain possession of the property for at least one year upon his unsecured promise to pay rental for that year, etc., for the period of three years—with the possibility of the whole of the rentals, if any, that he pays may have been consumed in paying his taxes and the upkeep of his property.

The petitioner urges that if Congress can, under the general bankruptcy act, or by the amendments embodied in Sections 74, 77 and 77B, take away a creditor's right to enforce the personal liability of the bankrupt, or destroy the right of a dissenting minority to enforce the security of the obligations of the composing debtor, then Congress may, in the interest of the debtor, also restrict or postpone the right of a deed of trust creditor to enforce his rights. This, too, was urged upon this Honorable Court in the Radford case, and there passed upon as follows:

"The bankruptcy power, like the other great substantive powers of Congress, is subject to the Fifth Amendment. Under the bankruptcy power Congress may discharge the debtor's personal obligation, because, unlike the states, it is not prohibited from impairing the obligation of contracts. Compare Mitchell *vs.* Clark, 110 U. S. 633, 643, 28 L. Ed. 279, 282, 4 S. Ct. 170, 312. But the effect of the Act here complained of is not the *discharge of Radford's personal obligation.* It is the *taking of substantive rights in specific property* acquired by the Bank prior to the Act."

3

The present Frazier-Lemke Act, declared to be an emergency measure, may apply to one geographical section and not to another

This provision in the Act has been cited as a lifeline to keep this act from being unconstitutional inasmuch as it provides that if in the judgment of the court such an emergency ceases to exist in any locality, then the court in its discretion, may shorten the stay of proceedings provided for therein and proceed to liquidate the estate. An emergency is defined in Webster's dictionary as "a sudden or unexpected occurrence or combination of occurrences demanding prompt action." Under this section a Federal Court would clearly be called upon to examine the economic welfare of each locality and inquire into the financial well-being of a majority of the citizens therein to determine whether or not the Frazier-Lemke Act should be enforced. Suppose the Federal Court would render a decision on this point and that ruling would be appealed from it to a higher court? What form of evidence could be produced that would satisfy a higher court in determining whether or not this act should apply? Furthermore, the application of this act would depend upon opinions as to the well-being of each community from time to time and would most certainly lead to a great state of confusion that would utterly destroy the provision of the Constitution whereby Congress is authorized to pass uniform laws on the subject of bankruptcy. This, of course, would run counter to the well-known and accepted

proposition that uniformity of this kind means geographical uniformity.

4

Conclusion

Respondent respectfully submits that a study of the present act, and of the opinion of this Honorable Court in the Radford case, and of the first Frazier-Lemke Act, that was by that case held unconstitutional, will disclose a studied effort by the draftsmen of the present act to give an appearance of compliance with the Radford decision, while at the same time it takes away from the creditor the same substantive right in specific property that was illegally to be accomplished by the first Frazier-Lemke Act.

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Supreme Court of the United States

OCTOBER TERM, 1936.

No. 530.

ROBERT PAGE WRIGHT, BANKRUPT, Petitioner,

versus

VINTON BRANCH OF THE MOUNTAIN TRUST BANK OF ROANOKE, VIRGINIA, AND A. C. HARRIS, TRUSTEE.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

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Supreme Court of the United States

OCTOBER TERM, 1936.

No. 530.

ROBERT PAGE WRIGHT, BANKRUPT, PETITIONER,

versus

VINTON BRANCH OF THE MOUNTAIN TRUST BANK OF ROANOKE, VIRGINIA, AND A. C. HARRIS, TRUSTEE.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF ON BEHALF OF APPELLEES.

OPINIONS BELOW.

Robert Page Wright vs. *Vinton Branch of the Mountain Trust Bank, etc.*, 85 Fed. (2d) 973, Circuit Court.

JURISDICTION.

Certiorari was granted December 21, 1936, under Judicial Code Section 240 (A) as amended by Act of Congress, February 13, 1925.

QUESTIONS PRESENTED.

The only question presented is the constitutionality of sub-section (s) known as the Frazier-Lemke Act of August 28, 1935, [49 Stat. 942; 11 U. S. C. A. 203 (s)], which was added as an amendment to Section 75 of the Bankruptcy Act (6 s, 1-6).

This includes three special considerations among others:

(1) Whether subsection (s) is within the power of Congress to establish uniform laws "on the subject of bankruptcies".

(2) Whether this legislation is an attempt by the Congress of the United States to regulate or change property rights established by the laws of the State of Virginia as between appellant and appellees under the pretext of enacting laws on the subject of bankruptcy.

(3) Whether subsection (s) is so arbitrary and unreasonable in its operation on the vested rights of creditors as to violate the "due process" clause of the Fifth Amendment.

STATUTES INVOLVED.

The Statutes involved are set forth in Appendix A, page 34 (*infra*).

STATEMENT OF PROCEEDINGS.

On March 29, 1935, Robert Page Wright, a resident of Bedford County, in the Western District of the State of Virginia, filed as a former debtor his petition (with schedules) in the United States District Court for the Western District of Virginia, praying for relief under Section 75 of the Bankruptcy Act and that all proceedings "by way of *pending and advertised foreclosures* of his farming lands" be stayed. In his schedules he valued his real estate at $2,500.00 and showed that in addition to taxes of $153.06 he owed secured claims of $5,797.87. (Trans., pp. 1 to 4.)

On March 30, 1935, this petition was, pursuant to Section 75 of the Bankruptcy Act, as amended by Act of June 28, 1934, referred to the Conciliation Commissioner; and on July 27, 1935, the petitioner submitted a proposal for extension of time for paying his indebtedness for a period of twelve months from July 27, 1935, etc. In that proposal he suggested that an effort be made to interest buyers in purchasing some boxwood on his land. (Trans., pp. 4 and 5.)

On September 20, 1935, the conciliation commissioner filed his report stating the plan submitted by the debtor's attorney was not accepted but "it was agreed that Mr. Wright and his attorney should be given a reasonable time in which to determine the exact amount of boxwood (which was to be sold under the plan of extension offered) could be sold for and when it could be sold and to report back to the conciliation commissioner at which time he would call a second meeting of the creditors". Such report was not received and, therefore, no agreement having been reached, the commissioner reported the facts to the Court for further instructions. (Trans., p. 7.)

On September 28, 1935, the District Court ordered the debtor should within fifteen days file his amended petition under said Section 75 of the Bankruptcy Act as

amended by the Act of August 28, 1935, asking to be adjudged a bankrupt, or suffer his proceeding to be dismissed. (Trans., pp. 7 and 8.)

On October 8, 1935, the debtor filed his amended petition under Section 75, Sub-section (s), of the Bankruptcy Act, stating he had failed to obtain acceptance of his creditors to his proposal of composition or extension; that the schedules filed with his original petition contain a full and true statement of his debts and an accurate inventory of all his property; and praying to be adjudged a bankrupt and for all the benefits of said Sub-section (s) as amended, and approved August 28, 1935. (Trans., pp. 8 and 9.)

On October 12, 1935, said petitioner was adjudged a bankrupt upon said amended petition, and the matter was then again referred to the Conciliation Commissioner. (Trans., p. 10.)

On January 8, 1936, upon the motion of respondent, Vinton Branch of the Mountain Trust Bank, said District Court terminated the proceeedings before the Commissioner and dismissed the case on the ground that said Sub-section (s) of Section 75 of the Bankruptcy Act is unconstitutional for the reasons set forth by said Court in the *case of John Clayton Sherman.* (Trans., pp. 9, 10 and 11.)

The *Case of John Clayton Sherman* referred to by the District Court is *In Re Sherman et als,* reported in 12 Fed. Sup. at page 297. It will be seen that said Court there held that the Act in question was retroactive as to pre-existing debts and took away substantial property rights in specific property and especially (1) the right of a deed of trust creditor to determine when the foreclosure sale should be held, subject only to the discretion of the Court, and (2) the deed of trust creditor's right to control meanwhile the property during the period of default, subject only to the discretion of the Court, and to have the rents and profits collected and applied to his secured debt.

OPERATION OF SUB-SECTION (S).

Consideration of the constitutionality of this legislation makes necessary a very careful analysis of the contents of this Act. Sub-section (s) is preceded by Sections 2, 3, 4 and 5, which provide for an attempt on the part of a farmer to obtain a composition or extension of his obligations by consent of a majority in number and amount of his creditors. It is only when these preceding sections have expended their force that sub-section (s) is brought into operation. Such an attempt to obtain the consent of such creditor is, therefore, a prerequisite to the relief provided for in sub-section (s). The debtor having failed to obtain such consent, or as sub-section (s) provides, if he feels aggrieved by the composition and/or extension obtained, he may petition for the relief prayed for in sub-section (s). The procedure then provided for is as follows, the debtor's property is appraised, his unencumbered exemptions as provided for by the state law are set aside to him, and he is allowed to retain possession under the supervision and control of the court of all the remainder of his property. At this point either party (debtor or creditors) may file objections to the appraisals, and the Act provides that such objections may be filed within four months from the date the Referee approves the appraisal. The value of the property having been fixed by the appraisal, the court the enters an order setting aside the exemptions and granting the debtor the possession of the property; but the Act at this point provides that the debtor shall hold said property subject to existing mortgages and encumbrances. The court then enters an order staying all judicial or official proceedings in any court or under the direction of any official against the debtor or his property for a period of three years, provided, however, that the debtor must pay a reasonable rental for the property of which he has possession. But, the Act provides

that the first payment of such rental shall be made within one year from the date of the order staying proceedings. In other words, under the Act the creditor could not demand that the rental be paid in less than a year after the order staying the proceedings, and then the rental shall be paid into court for the payment of taxes and upkeep of the property, the remainder to be distributed among the secured and unsecured creditors as their interests may appear. It should be observed at this point that the payment of the rental is not a condition precedent to the operation of the Act, and the creditors have no security for the payment of the rental although the first installment is deferred for one year after the order is entered staying official or judicial proceedings. It should be likewise observed that the creditors are not consulted in the application of the rental, but it must be used for the payment of the taxes and the upkeep of the property before its application to the payment of the debt or interest thereon.

Following this, Section 3 of sub-section (s) outlines a plan whereby a debtor may pay into court the amount of the appraisal of the property of which he retains possession. If the debtor offers to do this, then a creditor may request a re-appraisal of the debtor's property to fix the value of the property, or, if the creditor insists, the court shall order the property sold at public auction in which event the debtor shall have ninety days to redeem any property sold at such sale by paying the amount at which any such property was sold, and the court then delivers to him full possession and title to such property, free and clear of all liens and encumbrances.

There has been some little confusion as to the correct interpretation of Section 3 of sub-section (s), but the lower courts have generally adopted this interpretation.[1]

[1] *In re* Young, 12 F. Supp. 30. "It is argued by the debtor that the second proviso of this paragraph gives the mortgagee the right to demand a sale of the mortgaged premises *at any time* after the court takes jurisdiction and therefore meets the constitutional objections pointed out by the Supreme Court in the Radford Case. With this reasoning we are not in

Obviously, if this section could be construed to give the creditor the right at any time to demand a sale at public auction, it would not only defeat the whole purpose of the Act, but would be in express conflict with the other provisions in this Act which expressly and directly command that all official proceedings against the debtor shall be stayed for a period of three years from the date of the entry of the order staying such proceedings.

There are several other very pertinent and interesting provisions of this Act. It will be noticed in the latter part of Section 4, sub-section (s), that first of all, if a receiver is in possession of the property of the debtor at the time relief is prayed for under this legislation such receiver shall be divested of possession and the property returned to the debtor. There are no provisions in the Act safeguarding the creditors against loss by such

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accord. To place such a construction on the language of paragraph 3 would do violence to the whole purpose of the act. Neither do we think that the congressional debates on the subject lend support to any such theory. While the language of the act is inapt and uncertain, it undoubtedly was the purpose of Congress to give the secured creditor the right to demand a public sale of the mortgaged property only when the preceding provisions had expended their force. If and when the debtor might evidence a purpose to pay into court the appraised price of the land, then and then only the secured creditor might, if he saw fit, ask for a new appraisement with the further proviso that he might, if he should so elect, demand a public sale. We think, as a matter of construction of the act, that the *time* of such sale is in no way dependent upon the wish of the secured creditor, but must await the time during the three-year period when the debtor shall choose to act. Surely Congress, in its attempt at relief of the distressed farmer, did not intend to bring about the anomalous result of reducing his redemption period from twelve months (in Ill.) to ninety days. If the construction contended for by the debtor should prevail, then the debtor himself might urge with some plausibility the unconstitutionality of the act in abridging his statutory period of redeemption. * * * We conclude, therefore, that the act in question destroys the right of the mortgagee to determine when a sale of the mortgaged premises may be had, subject only to the discretion of the court; and destroys the right during default to control the property subject to the discretion of the court and to have the rents and profits collected by a receiver for the satisfaction of the debt. These are property rights acquired by the mortgagee and cannot be taken from him without due process of law. The method attempted is not due process. Even the bankruptcy power of Congress must yield to the Fifth Amendment in this respect as pointed out in the Radford Case.

change of possession. There is no provision in the Act authorizing the continuance of such receivership, if such would be for the best interest of the parties concerned.

Likewise, Section 6 of sub-section (s) provides that this is an emergency measure, and if in the judgment of the court such emergency ceases to exist in its locality, then the court in its discretion may shorten the stay of the proceedings herein provided for and proceed to liquidate the estate. At this point it should be observed that the term "emergency" is not defined, and no guidance is given the court to determine whether or not an emergency exists in a particular locality.

Taking this legislation as a whole and analyzing its various provisions, the inquiring mind is forced to the conclusion that this legislation is designed for the relief of debtors, not with the view of giving the debtor a discharge, which is the primary function of bankruptcy legislation, but to go beyond the discharge and give the debtor rights, benefits and equities of *which he may have divested himself by contract with his creditor* or which the state law concerning mortgage instruments may have vested in the creditor.

Another singular fact concerning this legislation is this: This act deals with farmers who have mortgaged their property. Under such conditions the fundamental law of the land would indicate that they are the owners of the equity of redemption in their land only. This manner of ownership is not mentioned in this Act nor is their position as such recognized by the terms thereof. We make mention of this only to show how fundamentally this legislation departs from bankruptcy legislation.

(1) *Whether sub-section (s) is within the power of Congress to establish uniform laws "on the subject of bankruptcies".*

This court had occasion to consider similar legislation in the case of *Louisville Joint Stock Land Bank* vs.

Radford, 295 U. S. 555, and in its opinion enumerated five property rights of which the legislation in question deprived the creditor.[1] In that case, this court was dealing with property rights recognized under the laws of Kentucky. It is, therefore, necessary to inquire at this time whether the same rights exist under the laws of Virginia and to inquire whether or not in Virginia a lien creditor has any other or different property rights, and if so, whether they are impaired. In the case at present before this court, the record shows that the debt was secured by a deed of trust whereby real estate is pledged as security for the payment of the debt shown in the bankruptcy schedule. In Virginia a common law mortgage is rarely used, although the term mortgagor and mortgagee is frequently used in referring to the debtor and creditor relationship under a deed of trust. In Virginia the property is not conveyed to the creditor himself, but to a disinterested trustee, who upon default exercises the rights provided for by statute and by contract. Actually, the deed of trust imposes more severe obligations on the debtor and greater rights in the creditor than obtained under the law relating to common law mortgages, and the creditor possesses these rights in a far more positive form. Section 5167 of the Code of Virginia sets forth in detail the obligations, rights and duties imposed by a deed of trust. Inasmuch as this statute is directly involved in this case, Section 5167 of the Code of Virginia is set forth in full as Appendix B in this brief. The pertinent parts of this statute, however, are as follows:

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[1] "(1) The right to retain the lien until the indebtedness thereby secured is paid.

(2) The right to realize upon the security by a judicial public sale.

(3) The right to determine when such sale shall be held, subject only to the discretion of the court.

(4) The right to protect its interest in the property by bidding at such sale whenever held, and thus to assure having the mortgaged property devoted primarily to the satisfaction of the debt, either through receipt of the proceeds of a fair competitive sale, or by taking the property itself.

(5) The right to control meanwhile the property during the period of default, subject only to the discretion of the court, and to have the rents and profits collected by a receiver for the satisfaction of the debt."

"'Every deed of trust to secure debts or indemnify sureties, except so far as may be therein otherwise provided, shall be construed to impose and confer upon the parties thereto, and the beneficiaries thereunder, the following duties, rights and obligations in like manner as if the same were expressly provided for by such deed of trust, namely:

"'(1) The deed shall be construed as given to secure the performance of each of the covenants entered into by the grantor as well as the payment of the primary obligation.

"'(2) The grantor shall be deemed to covenant that he will pay all taxes, levies, assessments and charges upon the property * * * so long as any obligation upon the grantor under the deed of trust remains undischarged * * *.

"'(4) The grantor shall be deemed to covenant that no waste shall be committed or suffered upon the property * * *.

"'(6) In the event of default in the payment of the debt secured, or any part thereof, at maturity, or in the payment of interest when due, or of the breach on any of the covenants entered into or imposed upon the grantor, then at the request of any beneficiary the trustee shall forthwith declare all the debts and obligations secured by the deed of trust at once due and payable, shall take possession of the property and proceed to sell the same at auction at the premises (or at such other place as the trustee may select) upon such terms and conditions as the trustee may deem best, after first advertising,' etc."

It should be especially observed that under the Virginia law no proceedings in court are necessary to enforce a deed of trust. Upon notification by the holder of

the debt that there has been a default, the trustee proceeds to sell the property, and *pending sale may rent the property for the future protection of the creditor.* The sale by the trustee is absolute and final, and the sale will not be enjoined in Virginia so long as the trustee acts within the powers given him by the trust instrument or by state law. It is, therefore, evident that the position of the secured creditor in this case and in the Radford case are similar, with the exception that in this case under the Virginia law the rights of the creditors are more absolute in form and the exercise of those rights are not subject to the discretion of the court.

The Hon. John Paul, District Judge for the Western District of Virginia, in the case of *In re* Sherman, 12 F. Supp. 297, in an unusually well considered opinion, not only compared the rights of a secured creditor in Virginia with the rights of a secured creditor in Kentucky and found that the secured creditor in Virginia had far more positive rights. He also applied the amended Frazier-Lemke Act now under consideration to these rights and decided that this legislation deprived the lienor of No. 2 and No. 5 of the enumerated objections to the original Frazier-Lemke Act set forth in the Radford case, specifically holding that this legislation violated the right of the creditor to realize upon the security by a judicial public sale and the right to control the property during the period of default, and to have the rents and profits collected by a receiver for the satisfaction of the debt.[1]

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[1]In the opinion "*In re* Sherman, 12 F. Supp. 297, the learned Judge of the District Court for the Western District of Virginia said of the Virginia statute in considering the constitutionality of the Frazier-Lemke Act here under consideration: "We may assume that the provision of the new Frazier-Lemke Act compelling an ultimate public sale of the property upon request of any secured creditor protects certain of the rights which were taken away by the old act; namely, the first, second, and fourth of the rights set out in the opinion in the Radford Case. But even if this be true, it seems clear that the amended act, equally with the original, threatens those rights which the Supreme Court enumerated as 3 and 5. These are in substance the right to determine when a sale shall be held and the right

This court held in the Radford case (*supra*), as it has very frequently held, that the bankruptcy power, like the other great substantive powers of Congress, is subject to the Fifth Amendment. In this opinion it is pointed out that under the bankruptcy power Congress may discharge the debtor's personal obligation, because unlike the states, it is not prohibited from impairing the obligation of contracts, but the taking of substantive rights in specific property acquired prior to the Act is expressly forbidden.

As a practical proposition, under the operation of this Act some time will be occupied, perhaps several

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to control the property during default, pending the sale. In the Radford Case it was said that the creditor possessed these rights under the Kentucky law, subject only to the discretion of the court. In Virginia, the same rights exist in more absolute form, for their exercise is not subject to the discretion of any court, unless, it may be, they were exercised in such an oppressive or wasteful manner as to constitute a fraud upon the rights of the debtor and thereby call for restraint by the court in an independent suit instituted for that purpose.

It will be noticed that in Virginia the trustee takes possession of the property at such time and place and upon such terms and conditions as he sees fit. It seems clear that the right to determine when a sale shall be held and the right to control the property pending a sale are abrogated by the Frazier-Lemke Act, even since its amendment. That act specifically provides that possession of the property shall remain in the debtor, and that all proceedings shall be stayed for a period of three years. That these provisions are subject to compliance with conditions imposed by the court does not lessen the fact that they take away rights previously vested in the creditor.

The most that can be said is that the amended act preserves the right to retain the lien until the debt is paid, and to that end provides for a public sale at which the creditor himself may bid, and by bidding may, if necessity arises, take over the property itself. But the right to compel such a sale is delayed for a period of three years or until such time within that period as the debtor may determine by offering to pay the appraised value of the property. The property remains in possession of the debtor subject only to such supervision as to its handling as a court may be able to give and subject to the payment of a reasonable rental. During this period the value of the property may decrease while the indebtedness increases through accumulated interest. The first installment of rent is not payable until the end of one year, so that for at least a year the creditor must sit by while his debt accumulates with no assurance that at the end of that time the debtor will be able to fulfill the obligations imposed upon him, or that he will not deliberately fail to do so."

months, in attempting to secure the relief provided for in the sections preceding sub-section (s) in regard to a composition or extension of the debtor's obligation with the consent of the creditors; then, when a petition is filed praying for the relief outlined in sub-section (s), a further period of months will be consumed in having the property appraised and putting the debtor in the position he must occupy before the stay is granted. It should be remembered that there is a four-months' period which would prolong the delay wherein he is given time to object to the appraisement. Then should the official and judicial procedure be stayed for a period of three years, no rent will be paid for one year, as the payment of rent is not a condition precedent to the operation of the Act; therefore, if we compare the position of the creditor under the Virginia law prior to the passage of this Act with his position subsequent to the passage of this Act, it is graphically shown that not only is the application of the security to the payment of the debt deferred for three or more years, but the rents and profits are diverted from him for one year or more, and *even then the rental is paid on taxes and the upkeep of the property in derogation of his rights.*

It is therefore submitted as a simple, practical proposition that the creditor has suffered a loss that may be, and is in this case, very substanial, and this legislation should be stricken down as was done in the case of *W. B. Worthen Co., etc.* vs. *Kavanaugh*, 295 U. S. 250, in which case it appeared that substantially the same substantive rights had been abridged.

(2) *Whether this legislation is an attempt by the Congress of the United States to regulate or change property rights established by the laws of the State of Virginia as between appellant and appellees under the pretext of enacting laws on the subject of bankruptcy.*

The rights of a secured creditor in Virginia have been heretofore shown. In bankruptcy proceedings gen-

erally the law governing the validity of mortgages and other liens and also as to ownership and interest in property has been definitely fixed as that of the locality in which the property is located.[1]

The demarcation between state and federal powers in regard to such matters and the departure of this legislation from such principles is brought into bold relief by considering the case of *Cox* vs. *Wallace*, 219 Fed. 126, wherein it was held that if the law of the State of Virginia permits the husband to convey property directly to his wife and thereby divest himself of any interest therein, then the bankruptcy court will recognize such law in controversies affecting the bankrupt's property.

While it has been long recognized that Congress has the right through bankruptcy legislation to modify in some respects the remedies available to lien-holders, yet it has been equally clear through the decisions of the courts that Congress has no power under the Bankruptcy Act to modify or impair the interest of secured creditors in mortgaged property.[2]

It appears obvious that by comparing the creditor's position after the act takes effect with his position prior to the operation of the act that the creditor by the operation of this act has suffered a change of position to his detriment and that the estate of the debtor has been enlarged thereby. This is true because while the property is in the possession of the debtor under the supervision and control of the court the net amounts received by the creditor on the debt through rental will be less than what he would receive with the trustee in possession, and in addition to that, sale is delayed by its operation. Therefore, this legislation does constitute an attempt by the

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[1] Remington on Bankruptcy, 4th Ed. 1405.
McCormick vs. *Sullivant*, 10 Wheat. 192.
U. S. vs. *Butler*, 56 Sup. Ct. 312.
U. S. vs. *Fox*, 94 U. S. 315.
Bailey vs. *Drexel Furniture Co.*, 259 U. S. 20.
Linder vs. *U. S.*, 262 U. S. 5.
Cox vs. *Wallace*, 219 Fed. 126.

[2] *Continental Illinois National Bank and T. Co.* vs. *Chicago, etc.*, 294 U. S. 648.

Congress of the United States to regulate or change the property rights established by the laws of the State of Virginia between the debtor and creditor.

(3) Whether sub-section (s) is so arbitrary and unreasonable in its operation on the vested rights of creditors as to violate the "due process" clause of the Fifth Amendment.

The guarantee of due process of law as provided for in the Fifth Amendment has long been recognized as one of the most important provisions of the Constitution of the United States.[1] Moreover, it has been said that without it the right of private property could not be said to exist in the sense which it is known to our laws.[2] Because of this fact, the provisions embodied in this guarantee have received a very broad and liberal interpretation.[3] In its construction, it in effect prohibits the taking of one person's property and giving it to another, contrary to settled usages and modes of procedure, and *such unlawful taking of one's property can never be defended as an exercise of the police power.*[4]

As a matter of fact, this provision was inserted in the Constitution for the purpose of imposing a limitation upon the powers of the National Government.[5] It was, therefore, pursuant to this legal principal that this court in the Radford case (*supra*) declared that the bankruptcy power of Congress, like all of the great substantive powers thereof, was subject to the limitations imposed by the Fifth Amendment.

It has been settled, for example, that any legislative body cannot invest a court with power to divest an owner of his property without compensation whenever in the exercise of its discretion it sees fit to do so.[6]

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[1] *Ulman* vs. *Baltimore*, 72 Md. 587; 20 Atl. 141.
[2] *Ochoa* vs. *Hernandez, etc.*, 230 U. S. 139.
[3] *People* vs. *King*, 110 N. Y. 418; 18 N. E. 245.
[4] 24 L. R. A. 152.
[5] *Munn* vs. *Illinois*, 94 U. S. 113.
[6] 2 Ann. Cas. 315; 67 L. R. A. 969.

It is therefore submitted in the light of this reasoning that sub-section (s) should be stricken down as contravening the requirements of the due process clause of the Fifth Amendment.

The effect of the operation of this Act on the rights of a secured creditor has been shown heretofore in this brief. The creditor's detrimental change of position may, however, be more forcibly shown by examining the effects in this particular case. On page 3 of the Record, the debtor by his own valuation estimates the value of his assets at $2,882.50. The same schedule shows debts of $6,559.50, a large part of which is owed to the appellees herein. This record further shows that this debtor first petitioned for relief under the original Frazier-Lemke Act, since invalidated, by filing a petition March 29, 1935. His petition asked that proceedings for foreclosure by appellees be stayed, which as shown by the record, was done. The order of reference was entered March 30, 1935, but it was not until September 27, 1935 (p. 5 of the record) that a proposal was made to the creditors. The original Act having been invalidated and a new law passed in August, 1935, on October 8th this debtor petioned for further relief, and on October 12, 1935, the matter was again referred to the conciliation commissioner. On Jan. 8, 1936, the Hon. John Paul, District Judge, ordered the case to be dismissed on the grounds that sub-section (s) was unconstitutional, and thence it has come on appeal.

Should the constitutionality of this legislation be upheld, a further order will have to be entered staying foreclosure proceedings for a period of three years, and this will be done in spite of the fact that *the bankruptcy schedule shows no possible hope of solvency and contains no possible basis for a financial rehabilitation as is claimed as the great objective of this Act.* Furthermore, in case this legislation is upheld, there will be more than another year elapsed before any rental will be paid, at which time there will be additional taxes due and owing and a strong probability of diverting the income from

the property for the purposes of making repairs as provided for in the Act. Therefore, as a practical proposition, from the facts presented in this case, the operation of this legislation will postpone almost indefinitely payment to the secured creditor represented in this case as the appellees, whereas under the law of Virginia the trustee has an immediate right of possession, and the beneficiary has an absolute and immediate right to demand sale of the property for payment of the debt. A careful inquiry into this particular situation leads to the very strong conviction that this is just such a situation as the Fifth Amendment was designed to prevent.

If the rule laid down in this court in the *Home Building & Loan Assoc.* vs. *Blaisdell*[1] and the Radford Case is correctly understood, it clearly asserts that while the mortgagee is debarred from actual possession, he should have, so far as rental value is concerned, the equivalent of possession during the extended period. In addition to this, he should have his interest carefully safeguarded. An examination of the facts in the case now under consideration would clearly indicate that neither is true under the operation of this Act, inasmuch as the creditor does not receive the equivalent of the rental and his interest in the property is not safeguarded as is explained heretofore in this brief.[2]

ANSWER TO LAW CONTAINED IN BRIEF OF COUNSEL FOR PETITIONER.

On page 12 of counsel's brief, point is made of the power of the Bankruptcy Court to have encumbered property sold free of liens. This, of course, has been

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[1] 290 U. S. 398.

[2] N. Y. U. Law Quarterly Rev., p. 465 (Mar. 1936).

46 Harvard Rev.

In re Lowman, 79 Fed. (2d) 887, in which the court said, "Federal courts may be authorized to assume jurisdiction over and to administer property of bankrupts, but they must administer that property as they find it, and they have no power to create new rights for the benefit of either debtor or creditor."

well recognized as a power of the Bankruptcy Court and does not contain any principle of law helpful to the constitutionality of the legislation under consideration. As was observed in the Radford case (*infra*), such sales are held when it is to the interest of other creditors, and it is a settled principle that sale of encumbered property will not be ordered by the court if the amount of the liens exceeds the value of the property.

Pages 19 to 26 and at other points in the brief, counsel for the petitioner attempt to compare the Frazier-Lemke Amendment to Sections 77 and 77B of the Bankruptcy Act under which this court in the case of *Continental Illinois Nat. Bank and T. Co.* vs. *Chicago, etc.*, 294 U. S. 648, decided that the secured creditors were not deprived of such vested rights as would render Section 77B unconstitutional, and that the constitutionality of Section 77B had never been successfully attacked. It is apparent that they are putting great reliance on the last-mentioned decision. As a matter of fact, the same contention appears to have been made in regard to the constitutionality of the original Frazier-Lemke Amendment, and this court, in the Radford Case, clearly pointed out the error of this reasoning and the distinct difference between the Frazier-Lemke Amendment and Section 77 and 77B of the Bankruptcy Act. In the Radford Case, this court disposed of this contention as follows:

> "Nor do the provisions of the bankruptcy acts concerning compositions afford any analogy to the provisions of Sec. 7. So far as concerns the debtor, the composition is an agreement with the creditors in lieu of a distribution of the property in bankruptcy—an agreement which 'originates in a voluntary offer by the bankrupt, and results, in the main, from voluntary acceptance by his creditors.' (Citing cases). So far as concerns dissenting creditors, the composition is a method of adjusting among creditors rights in property in which all are interested. In ordering the adjustment, the bankruptcy court exercises a power similar to that long exercised

by courts of law (citing cases), and of admiralty (citing cases). It is the same power which a court of equity exercises when it compels dissenting creditors, in effect, to submit to a plan of reorganization approved by it as beneficial and assented to by the requisite majority of the creditors (citing cases). In no case of composition is a secured claim affected except when the holder is a member of a class; and then only when the composition is desired by the requisite majority and is approved by the court. Never, so far as appears, has any composition affected a secured claim held by a single creditor. Compositions are comparable to the voluntary adjustment with the mortgagee provided for in Sec. 3 of the Frazier-Lemke Amendment. They are not analogous to the so-called adjustment compelled by Sec. 7."

In addition to this, it is submitted that the contrast is even larger because of the fact that Sections 77 and 77B follow general principles in that dealing with a large number of creditors as a class is the only possible way the court could deal with them. Also, under this legislation, what is done is for the best interest of the creditors, there being a consent of a two-thirds majority in number and amount, and while this legislation may modify or somewhat restrict the rights of secured creditors, there is no analogy whatever with respect to the Frazier-Lemke Act for the simple reason that sub-section (s) of Section 75 operates against the consent of the secured creditor and the restriction of his rights is against his will; whereas the restriction on the rights of the secured creditors under Sections 77 and 77B are in accordance with his will, as expressed by a majority of the creditors of his class.

Particular attention is called to the fact that in regard to railroad reorganization legislation the court is concerned with a public utility, the bonds of which have been purchased by the public with full knowledge of the type of business it operates and with full notice of the fact that public interest requires its continual and unin-

terrupted operation. The whole theory of corporate reorganization and composition or extension provisions under Section 75 of the Bankruptcy Act is based on the fact that a two-thirds majority in number and amount of any one class of creditors is permitted to determine what shall be done for the best interest of the debtor. As a practical proposition this is the only way the court can effectively protect the interest of such secured creditors. As a matter of law it is not true as is stated in the fourth paragraph, page 71, of petitioners's brief that "What Congress can do to one-third or a majority under the Constitution it can do to all of the creditors". This statement fails to take into consideration the well-established equitable principles that following the consent of the majority is, in effect, the same as following the individual consent of each secured creditor.

Exception is likewise taken to the statement contained in the latter part of the third paragraph, page 25, of said brief that the Constitution recognizes neither majorities nor minorities and most assuredly, the due process clause doesn't." The Constitution may not recognize majorities and minorities, but most assuredly the due process clause has been interpreted so as to give such recognition.[1] It, therefore, does not follow, as is stated in the first paragraph on page 6 of said brief, that Sections 77 and 77B and the Frazier-Lemke Amendment must stand or fall together under the Constitution.

Exception is taken to the statement of said counsel on page 44, Paragraph 4, that Congress has the same police power within the grants of power enumerated in the Constitution as the states have within their reserved powers, and that wherever the Federal Government has police power it is precisely the same police power that the states exercise. This Court has already answered this in the Radford Case when it said that the bankruptcy power of Congress is limited by the Fifth Amendment.

[1] *Head* vs. *Amoskeag Mfg. Co.*, 113 U. S. 9; *Shaw* vs. *Little Rock and Ft. S. R. Co.*, 100 U. S. 605.

As a matter of logic, this is precisely the same thing as saying that two columns of figures will equal each other without arriving at the total. Because the sources of these two powers are entirely different, the necessities occasioning their exercise are not in common and the reasons and principles for the limitation of these two powers are almost the exact opposite in these two cases. It is well established that Congress has no police power within the grants of the powers enumerated in the Constitution except insofar as such powers are incidental to the exercise of some power delegated in the Constitution.[1]

Following this paragraph on Page 44, in the next paragraph, it is stated that wherever sovereignty goes police power goes to the full limits of the sovereignty without restraint. It would seem that this statement is misleading in that the police power, to be exercised by Congress, must be incidental and an attribute of sovereignty in order to be enjoyed by the Federal Government. It is then submitted, in the sixth paragraph on page 53 of said brief that the Frazier-Lemke Amendment is valid under the power of Congress to legislate federal police power incidental to the subject of bankruptcies. Now this is subject to two severe criticisms: (1) It removes the restraint on Congress that any legislation on the subject of bankruptcies must be subject to the restraint imposed by the Fifth Amendment to the Constitution or the due process clause (Radford Case, *supra*). (2) It fails to show that the Frazier-Lemke Act is in the nature of a police power or is incidental to the bankruptcy powers of Congress. Counsel cite the *Home Building & Loan Assoc.* vs. *Blaisdell Case*, 290 U. S. 231, on page 54 of their brief and at other points. It is submitted that to compare the Frazier-Lemke Act with the Minnesota Moratorium Case is to assume that the Fourteenth Amendment imposes the exact restraints upon the State Governments as the Fifth Amendment imposes on the National Government. Such is not the case and no valid reasoning can be produced to substantiate this conten-

[1] *Hamilton* vs. *Ky. Distilleries*, 251 U. S. 246.

tion. An emergency may enlarge the police power of the state because it is only in the event of an emergency that it is needed, but as was pointed out by this court in the Blaisdell Case and the case of *U. S.* vs. *Schechter, etc.*, 295 U. S. 495, an emergency does not create or enlarge constitutional power, although it may be the occasion for the exercise of such constitutional power already possessed. In regard to such police power the relief must be appropriate to the emergency and be based upon reasonable conditions. On the other hand, as regards the bankruptcy power of Congress, since it is limited by the Fifth Amendment an emergency does not enlarge the power of Congress under this clause of the Constitution.

As a matter of fact, if the Blaisdell Case is carefully considered, it is found that the Minnesota Moratorium gave the asecured creditor far more than sub-section (s) gives such creditor, because under the Minnesota law, while the mortgagee is debarred from actual possession, he receives the equivalent of possession by a rental paid on taxes, interest and insurance. Also, under the Minnesota law, the moratorium was never granted for a stay of more than two years, instead of three years as was provided for in the Frazier-Lemke Act. In other respects, the Minnesota law safeguards more adequately the rights of the secured creditor.

DECISIONS IN THE UNITED STATES DISTRICT AND CIRCUIT COURTS.

A review of the decisions in the United States Circuit shows that three courts (the Fourth Circuit, the Seventh and Eighth Circuits) have held this act unconstitutional, while one United States Circuit Court, in the Fifth Circuit, has held this act constitutional.[1] On the other hand, ten United States District Courts, not counting the decision of the District Court in the case now under con-

[1] *Dallas Joint Stock Land Bank* vs. *Davis*, 83 F. (2d) 322.

sideration, have held this act unconstitutional[1] as against seven decisions of the District Courts which have held this act constitutional.[2] Special attention is is called to the decisions of the United States Circuit Court, especially the Lowman Case reported in 79 Fed. (2nd) 887, wherein the effect of this legislation is very carefully considered, and the court made this statement: "Federal Courts may be authorized to assume jurisdiction over and to administer property of the bankrupts, but they must administer that property as they find it and have no power to create any rights in it for the benefit of either debtor or creditor".

In the Lowman case (*supra*) and the case of *U. S. Nat. Bank of Omaha* vs. *Pamp,* 79 Fed. (2nd) 887, this act is construed as not allowing the creditor the right to demand a sale at public auction until the debtor chooses to redeem as provided for in the statute. In other words, the court said that the stay is for a period of three years, subject to being shortened by the mortgager at his uncontrolled discretion. This holding is typical of the cases holding against the validity of the Act. It is followed by the finding that while the new legislation may sufficiently secure the mortgagee's right to retain his lien until payment of his debt, to realize upon the security at a judicial public sale, and his right to protect his interest by bidding at such a sale, yet the mortgagee is *unlawfully deprived of his right to determine when such sale shall take place and his right to possession of the property through a receivership or otherwise pending the sale.*

In the Slaughter case (*supra*) the Act was held con-

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[1] *Wright* vs. *Vinton Branch of the Mountain Trust Bank,* 4 U. S. Law Week 129; *In re* Sherman, 12 F. Supp. 287; *U. S. National Bank of Omaha* vs. *Pamp,* 83 F. (2d) 493; *Lafayette Life Insurance Co.* vs. *Lowman,* 79 F. (2d) 887; *In re* Maynard, 15 F. Supp. 809.

[2] *In re Slaughter,* 13 F. Supp. 893, 12 id. 206; *In re Bennett,* 13 F. Supp. 353; (1936) 4 Geo. Wash. L. Rev. 525, cert. den. Oct. 12, 1936; 4 U. S. Law Week 124; *In re Cole,* 13 F. Supp. 283; *In re Reichert,* 13 F. Supp. 1; *In re* Paul, 13 F. Supp. 645; *In re* Williams, 12 F. Supp. 206; *In re* Chilton, 16 F. Supp. 14.

stitutional, but the Court said "a study of the decision of the Supreme Court in the *Louisville Bank* vs. *Radford,* decided May 27, 1935, does leave some doubt as to the validity of the present Act, but the doubt is not of sufficient degree to give rise to that conviction which a trial court should have before declaring an Act of Congress unconstitutional". This same hesitancy is also shown by District Courts in the Bennett and Cole Cases (*supra*).

The importance of the decisions of the United States Circuit Courts of Appeals would seem to justify setting out the facts of these cases more fully:

THE LOWMAN CASE.

The first United States Circuit Court of Appeals to hold this act unconstitutional was the Seventh Circuit in the case of *Lafayette Life Insurance Company* vs. *Lowman,* 79 Fed. (2nd) 887. In that case the Insurance Company commenced suit for the foreclosure of a mortgage on farm lands in a state court of Indiana in January, 1933. After a decree of foreclosure, the land was sold August 5, 1933. Under the Indiana statutes a certificate of purchase was issued and the owner of the land had one year from the date of the sale in which to redeem. No deed could be executed during this redemption period. Further proceedings were then withheld by operation of the original Frazier-Lemke Act, and finally, in Octobr, 1935, the proceedings were continued by the Referee for administration under the 1935 Frazier-Lemke Act. Objections to these proceedings were made because of the constitutionality of this present Act, and an order was entered dissolving an injunction which restrained the sheriff of Benton County, Indiana, from issuing a deed pursuant to the certificate of sale. In other words, the District Court held the Act unconstitutional, and an appeal was obtained to the Circuit Court.

The United States Circuit Court of Appeals declared the Act unconstitutional, and in a very well considered opinion the court determined that there was nothing in the Constitutional clause conferring upon Congress the control of bankruptcy proceedings which would authorize it to change property rights already created by the states.

THE PAMP CASE.

The second United States Circuit Court of Appeals decision which held this Act unconstitutional was from the Eighth Circuit in the case of *United States National Bank of Omaha* vs. *Pamp,* 83 Fed. (2d) 493. This was an appeal from an order granting the application of a debtor to reinstate his position under the amended Frazier-Lemke Act and staying foreclosure proceedings under the law in the state of Nebraska. In this case the property had been sold, but the sale had not been confirmed by the court. In reversing the District Court, the Circuit Court held that the legislation unlawfully took from a secured creditor a vested right, saying in part "there is no escape from the conclusion that the mortgagee creditor is deprived of his substantial right by this Act, in that the right to determine when a sale shall be held, subject to any discretion the court may have, is taken from the court and vested in the mortgagor who may enforce a delay of at least three years. While this opinion is based somewhat on the authority of the Lowman Case, it very definitely shows a careful examination of the law and the facts involved and reveals that the court arrived at its decision independent of the Lowman Case by applying well-recognized constitutional principles to the matter under consideration.

THE WRIGHT CASE.

The third United States Circuit Court to hold this Act unconstitutional was the Fourth Circuit, in the case now under consideration and from which an appeal was had to this court to attempt a reversal. This opinion is a part of the record in this suit and reference is made to it for a complete account of the decision. It will be found, however, that this court found in substance that the laws of Virginia are not materially different from the rights recognized by the law of Kentucky, as set forth in the Radford Case, and that the law of Virginia gave the creditor rights which were unlawfully taken away by the Frazier-Lemke Act. Also, the court found that the emergency provision in the Act was unsatisfactory in that in extending its benefits to some judicial districts of the court and not to others it destroyed the uniformity requirement necessary for Congress to enact laws on the subject of bankruptcy.

There are many forceful opinions delivered by the various district courts concerning this legislation and holding the same unconstitutional. Some of the outstanding opinions are as follows: *In re* Young, 12 Fed. Supp. 30; *In re* Lindsay, 12 F. Supp. 625; *In re* Sherman, 12 F. Supp. 297; *In re* Davis, 13 F. Supp. 221.

NECESSITIES FOR THIS LEGISLATION.

That there has been much distress and financial losses among farmers is admitted by every one. It has not, however, been satisfactorily shown that their financial distress was greater than perhaps other large classes of people. Also, that there has been considerable recovery of the farmer is likewise evident. It is likewise pointed out that it has been the loss of income on the part of the farmer that has occasioned the entire difficulty. The Frazier-Lemke Act does not, of course, help the farmer except as to his finances, and then only by giving him a period of grace on his obligations. It does

not even go so far as to refinance his debts in any permanent way so as to advance him along the road to financial rehabilitation. Actually, a farmer burdened with debt is more in need of relief by having his debts refinanced than he is in receiving a moratorium on payments. The fact that he is already in arrears in his payments is perhaps evidence of the fact that his obligations are either too large or his payments are not commensurate with his income.

It is a matter of public record that the Federal Government has already enacted some very liberal legislation for the relief of the farmer in the Farm Credit Administration, the Home Owners Loan Corporation, and through the Land Bank Commissioner loans, as well as loans to co-operative associations. It has been pointed out by many thinking experts that the ultimate effect of the Frazier-Lemke Act might be to so restrict credit of farmers as to do them harm instead of good. Mr. John Hanna, who is a visiting professor of law of the University of Missouri, has written a very valuable and enlightening article on the new Frazier-Lemke Act, which appears in the January, 1936, issue of the Missouri Law Review. On page 16 of this review, Mr. Hanna states as follows:

> "If the second Frazier-Lemke Act is declared unconstitutional by the Supreme Court the real effect on the farm population as a whole will be negligible. If such a law were constitutional and were in effect for any considerable period it is by no means certain that its net effect would be good. There is little doubt that it would diminish the attractiveness of the farmer as a credit risk. Even government financing agencies so long as they are operated on a business basis, and especially where they depend upon the investment market for funds, would have to take the Frazier-Lemke Act into account. The reaction of private lenders would be more promptly felt, either in refusals to lend to farmers at all or in increased interest rates and other charges.

The financial state of farmers as a whole was never as desperate as one might have supposed who listened only to the professional and other friends of the farmer. Not all farm land is mortgaged. In Story County, Iowa, in 1931, for example, 59 per cent of the farm land was mortgaged.[1] Not all mortgages are or ever were in default. Except for temporary defaults due to the banking holiday in 1933, mortgage defaults in the country as a whole even during the depression ranged from 2 to 6 per cent annually.[2] The operations of the Farm Credit Administration have put many farm obligations on a long term low rate basis where the farmer is easily able to carry the load. The activities of the A. A. A. and the improvement in business have greatly increased the farmer's income.[3] Many voluntary adjustments of farm debts have been made by creditors, some coerced perhaps by fear of the Frazier-Lemke Act, but not legally dependent upon it, and now established. Certain regions lately affected by drought or other calamity still need rehabilitation and isolated individuals are still financially oppressed. So far as bankruptcy can help such situations at all, it is likely that what is needed are regular bankruptcy proceedings rather than moratoria. One finds a confirmation of this in many cases filed under Section 75. The petitioners are often

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[1]Wallace G. Murray, An Economic Analysis of Farm Mortgages in Story County, Iowa, 1854-1931 (1933) Iowa Agri. Research Bull. #156.

[2]The Yearbook of Agriculture (1935) 692, gives the following figures showing the number of farms per 1,000 changing hands as a result of forced sales or other defaults. The figures follow:

	United States	West North Central States
1930	20.8	27.5
1931	26.1	31.3
1932	41.7	47.1
1933	54.1	59.5
1934	39.1	40.7

The West North Central region comprises Minnesota, Iowa, Missouri, North and South Dakota, Nebraska and Kansas.

[3]The United States Department of Agriculture estimates of farm income for the past three years are as follows:

1932	$4,328,000,000
1933	4,868,000,000
1934	5,950,000,000

persons who have no reasonable likelihood of working out of their difficulties in three or five years or ever. Their only chance is to start again quite at the beginning.

Mr. Hanna further states in this article that this legislation is an insignificant item in the work of farm rehabilitation. He estimates that perhaps less than ten thousand cases have been filed, and that in only a minor fraction of these cases does it make any permanent difference whether or not he obtains such a moratorium.

The relative unimportance of this legislation is shown by the fact that while 9,187 cases have been filed under Section 75 in about four-fifths of the judicial districts,[1] during approximately the same period the Farm Credit Administration handled 1,000,000 loan applications.[2]

Counsel for petitioner, in their brief, page 34, paragraph 2, state that during the first eight months of 1936 the Farm Credit Administration has foreclosed or arranged to foreclose 30,627 farm mortgages. Attention is called to the fact that these foreclosures are handled

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[1]10 J. Nat. Ass'n Referees in Bankruptcy 23 (1935).

[2]By its second anniversary on May 27, 1935, the Farm Credit Administration had made advances and grants of about $3,000,000,000 to American farmers or an average of about $4,000,000 a day since its organization. This includes the drought relief funds, and crop production loans, and loans to co-operatives, as well as the Land Bank and Land Bank Commissioner's loans. Farm mortgage loans by the 12 Federal Land Banks and the Land Bank Commissioner aggregate $1,725,000,000. Counting the loans made by Land Banks prior to the establishment of the Farm Credit Administration, such mortgage loans are in excess of $2,000,000,000. Farmers used about 90 per cent of the money lent on farm mortgages to pay their creditors. Commercial Banks received over $400,000,000, insurance companies $235,000,000, joint stock land banks $125,000,000, state and county tax authorities $50,000,000 and individuals and other unclassified creditors $725,000,000. Applications for new loans are being received in greatly reduced volume from the peak periods in 1933 and 1934. (Figures are from the Second Report of the Farm Credit Administration.)

In connection with the amount of new farm credit, attention is invited also to the recent statement of Mr. Rexford G. Tugwell, Undersecretary of Agriculture, that 150,000 voluntary adjustments of farmers' debts had been effected in the past two years.

under a law passed by Congress and that Congress could revise this legislation so as to benefit far more farmers than would be benefitted, according to Mr. Hanna's figures above set forth, by upholding the Frazier-Lemke Act. It is submitted, however, that whatever may be the needs of the farmers in this respect, holding this legislation constitutional would probably bring hardships on many creditors as well as governmental agencies. But above all else, as was said by this court at the conclusion of the opinion in the Radford Case, the "Fifth Amendment commands that however great the nation's need, private property shall not be thus taken for a wholly public use without just compensation". It is further stated that "if the public interest requires and permits the taking of the property of individual mortgagees in order to relieve the necessities of individual mortgagors, resort must be had to proceedings by eminent domain, so that through taxation the burden of the relief afforded in the public interest may be borne by the public.

UNIFORMITY REQUIREMENT DESTROYED BY EMERGENCY CLAUSE.

This Act is described as emergency legislation and provides that "if in the judgment of the court such emergency ceases to exist in its locality, then the court in its discretion may shorten the stay of proceedings herein provided for and proceed to liquidate the estate". It will be noticed that the term "emergency" herein used is not defined.

Webster defines an emergency as "a sudden or unexpected occurrence or combination of occurrences demanding prompt action".

It is, therefore, obvious that under this section a Federal court would clearly be called upon to examine the economic welfare of each locality and inquire into its financial wellbeing to determine whether or not the Frazier-Lemke Act should be enforced. This obviously will

lead to a state of confusion wherein this legislation might be enforced in some states and not in others, in some counties and not in others, and in some judicial districts and not in others. The uniformity required by the Consituation has been held to be a geographical uniformity. (*Leidight, etc.*, vs. *Tengel*, 95 Fed. 637). Two district courts have examined this part of the legislation and have found that it leaves the status of the emergency too vague and undefined.[1] Also, the Circuit Court in the present case said in regard to this provision, "It would seem that such a provision violates the constitutional requirement of geographical uniformity and would be void for that reason, even if not given the effect of invalidating the remainder of the Act.

It should be noted at this point that this statute does not contain a "separability clause", and for this reason this court has no aid in determining the legislative intent. It is, however, very important to denote that the term "emergency" herein is made to embrace the entire subsection (s) in that the whole Act is declared to be an emergency measure. In the absence of the separability clause this court cannot definitely determine that Congress meant this Act to operate independent of the emergency provisions.

In the case of *Crowell* vs. *Benson*, 285 U. S. 22, this court sustained in part a compensation act containing a separability clause. This act contained provisions authorizing conclusive findings of fact by an administrative body. This was objected to because certain facts were jurisdictional and under the Constitution must be decided independently by the judicial department. This court upheld the act as a whole, but found this part of the act unconstitutional. The court was able in interpreting this act to find that there was no violation of the purpose of Congress in sustaining the remaining part of the act. This court, however, in separating the emergency measure from subsection (s) must go far beyond

[1] *In re* Schoenleber 13 Fed. 375; *In re* Tschoepe, 13 Fed. 371.

the rule laid down in the Crowell case because the emergency clause defines and qualifies the entire subsection (s) and the court cannot therefore say that Congress would have enacted this legislation without the emergency provision; and further, that it was the purpose of Congress for this act to operate independent of the emergency provision. Moreover, the nature of the act throughout qualifies it as emergency legislation. Therefore, should this court strike down the emergency clause, it will, in effect, be creating an entirely different type of legislation, which, of course, is the function of a legislative body and not a court.

At this point it should be observed that one district court found objections to this legislation as not being uniform bankruptcy law, in that it applies only to farm mortgages, and so only to a special class of debtors. *In re* Davis, 13 F. Supp. 221.

CONCLUSION.

We have sought herein first of all to show what rights the creditors are given by the law of the State of Virginia—that these rights are definite and that upon default in the payment of the debt secured, these rights may be immediately exercised by the creditor—that Congress has plainly and clearly exceeded its powers as restrained by the Fifth Amendment in passing legislation which so clearly abrogates these rights and divests the secured creditor of the right to possession and the right to demand payment of his debt by application of the security.

We have not sought in this brief to ask this court for a conservative constitutional construction, but we have attempted to show that the Constitution itself forbids this legislation by the provisions therein whereby it is provided that any person shall not be deprived of his property without due process of law and that private property shall not be taken for a public purpose without just compensation, and that bankruptcy laws must con-

tain geographical uniformity and have a reasonable relevancy to the subject of bankruptcy. It is believed that the principle we have sought to sustain in this brief is a principle that is essential to National integrity—that in asking that this legislation be stricken down as unconstitutional we are simply calling for a new application of constitutional principles demanded by modern conditions.

The harm this legislation might actually do the farmer could be enlarged upon indefinitely because to destroy his credit is to interfere with his food for growth and development. The inherent evil in this type of legislation is a great danger to our national welfare. Nothing could be more paralyzing and corroding to our economic welfare than to sustain a law which unjustly takes from the citizen the fruits of his labor.

We have studiously sought to avoid the balancing of vested interest against human interest or the clash of capital with those financially distressed. We do not believe that there are any such matters involved in this case. We are asking to have stricken down legislation which the Constitution of the United States was enacting to protect every one against. Regardless of any transition or changing of our economic order, there still remains a fundamental protection afforded each citizen by this great document. Under this protection we are asking this court to nullify an act of Congress which so clearly contravenes the letter and the spirit of this Constitution.

Respectfully submitted,

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APPENDIX A.

(Public—No. 384—74th Congress.)

(S. 3002.)

AN ACT

To amend an Act entitled "An Act to establish a uniform system of bankruptcy throughout the United States", approved July 1, 1898, and Acts amendatory thereof and supplementary thereto.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 75 of said Act, as amended, be further amended by amending the second sentence of subsection (b), so as to read as follows: "The conciliation commissioner shall receive as compensation for his services a fee of $25 for each case submitted to him, and when docketed, to be paid out of the Treasury."

SEC. 2. That section 75 of said Act, as amended, be further amended by amending subsection (g) to read as follows:

"(g) An application for the confirmation of a composition or extension proposal may be filed in the court of bankruptcy after, but not before, it has been accepted in writing, by a majority in number of all creditors whose claims have been allowed, including secured creditors whose claims are affected, which number shall represent a majority in amount of such claims."

SEC. 3. That section 75 of said Act, as amended, be further amended by amending subsection (k) to read as follows:

"(k) Upon its confirmation, a composition or extension proposal shall be binding upon the farmer and his secured and unsecured creditors affected thereby: *Provided, however,* That such extension and/or composition shall not reduce the amount of or impair the lien of any secured creditor below the fair and reasonable market value of the property securing any such lien at the time that the extension and/or composition is accepted, but nothing herein shall prevent the reduction of the future rate of interest on all debts of the debtor, whether secured or unsecured."

SEC. 4. That section 75 of said Act, as amended, be further amended by amending subsection (n) to read as follows:

"(n) The filing of a petition or answer with the clerk of court, or leaving it with the conciliation commissioner for the purpose of forwarding same to the clerk of court, praying for relief under section 75 of this Act, as amended, shall immediately subject the farmer and all his property, wherever located, for all the purposes of this section, to the exclusive jurisdiction of the court, including all real or personal property, or any equity or right in any such property, including, among others, contracts for purchase, contracts for deed, or conditional sales contracts, the right or the equity of redemption where the period of redemption has not or had not expired, or where a deed of trust has been given as security, or where the sale has not or had not been confirmed, or where deed had not been delivered, at the time of filing the petition.

"In all cases where, at the time of filing the petition, the period of redemption has not or had not expired, or where the right under a deed of trust has not or had not become absolute, or where the sale has not or had not been confirmed, or where deed had not been delivered, the period of redemption shall be extended or

the confirmation of sale withheld for the period necessary for the purpose of carrying out the provisions of this section. The words 'period of redemption' wherever they occur in this section shall include any State moratorium, whether established by legislative enactment or executive proclamation, or where the period of redemption has been extended by a judicial decree. In proceedings under this section, except as otherwise provided herein, the jurisdiction and powers of the courts, the title, powers, and duties of its officers, the duties of the farmer, and the rights and liabilities of creditors, and of all persons with respect to the property of the farmer and the jurisdiction of the appellate courts, shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on the day when the farmer's petition, asking to be adjudged a bankrupt, was filed with the clerk of court or left with the conciliation commissioner for the purpose of forwarding same to the clerk of court."

SEC. 5. That section 75 of said Act, as amended, be further amended by amending subsection (p) to read as follows:

"(p) The prohibitions of subsection (o) shall apply to all judicial or official proceedings in any court or under the direction of any official, and shall apply to all creditors, public or private, and to all of the debtor's property, wherever located. All such property shall be under the sole jurisdiction and control of the court in bankruptcy, and subject to the payment of the debtor farmer's creditors, as provided for in section 75 of this Act."

SEC. 6. That section 75 of said Act, as amended, be further amended by adding a new subsection (s), after subsection (r), to read as follows:

"(s) Any farmer failing to obtain the acceptance of a majority in number and amount of all creditors whose claims are affected by a composition and/or extension proposal, or if he feels aggrieved by the composition and/or extension, may amend his petition or answer, asking to be adjudged a bankrupt. Such farmer may, at the same time, or at the time of the first hearing, petition the court that all of his property, wherever located, whether pledged, encumbered, or unencumbered, be appraised, and that his unencumbered exemptions, and unencumbered interest or equity in his exemptions, as prescribed by State law, be set aside to him, and that he be allowed to retain possession, under the supervision and control of the court, of any part or parcel or all of the remainder of his property, including his encumbered exemptions, under the terms and conditions set forth in this section. Upon such a request being made, the referee, under the jurisdiction of the court, shall designate and appoint appraisers, as provided for in this Act. Such appraisers shall appraise all of the property of the debtor, wherever located, at its then fair and reasonable market value. The appraisals shall be made in all other respects with rights of objections, exceptions, and appeals, in accordance with this Act: Provided, That in proceedings under this section, either party may file objections, exceptions, and take appeals within four months from the date that the referee approves the appraisal.

"(1) After the value of the debtor's property shall have been fixed by the appraisal herein provided, the referee shall issue an order setting aside to such debtor his unencumbered exemptions, and his unencumbered interest or equity in his exemptions, as prescribed by the State law, and shall further order that the possession, under the supervision and control of the court, of any part or parcel or all of the remainder of the debtor's property shall remain in the debtor, as herein provided

for, subject to all existing mortgages, liens, pledges, or encumbrances. All such existing mortgages, liens, pledges, or encumbrances shall remain in full force and effect, and the property covered by such mortgages, liens, pledges, or encumbrances shall be subject to the payment of the claims of the secured creditors, as their interests may appear.

"(2) When the conditions set forth in this section have been complied with, the court shall stay all judicial or official proceedings in any court, or under the direction of any official, against the debtor or any of his property, for a period of three years. During such three years the debtor shall be permitted to retain possession of all or any part of his property, in the custody and under the supervision and control of the court, provided he pays a reasonable rental semiannually for that part of the property of which he retains possession. The first payment of such rental shall be made within one year of the date of the order staying proceedings, the amount and kind of such rental to be the usual customary rental in the community where the property is located, based upon the rental value, net income, and earning capacity of the property. Such rental shall be paid into court, to be used, first, for payment of taxes and upkeep of the property, and the remainder to be distributed among the secured and unsecured creditors, and applied on their claims, as their interests may appear. The court, in its discretion, if it deems it necessary to protect the creditors from loss by the estate, and/or to conserve the security, may order sold any unexempt perishable property of the debtor, or any unexempt personal property not reasonably necessary for the farming operations of the debtor, such sale to be had at private or public sale, and may, in addition to the rental, require payments on the principal due and owing by the debtor to the secured or unsecured creditors, as their interest may appear, in accordance with the provisions of this

Act, and may require such payments to be made quarterly, semiannually, or annually, not inconsistent with the protection of the rights of the creditors and the debtor's ability to pay, with a view to his financial rehabilitation.

"(3) At the end of three years, or prior thereto, the debtor may pay into court the amount of the appraisal of the property of which he retains possession, including the amount of encumbrances on his exemptions, up to the amount of the appraisal, less the amount paid on principal: Provided, That upon request of any secured or unsecured creditor, or upon request of the debtor, the court shall cause a reappraisal of the debtor's property, or in its discretion set a date for hearing, and after such hearing, fix the value of the property, in accordance with the evidence submitted, and the debtor shall then pay the value so arrived at into court, less payments made on the principal, for distribution to all secured and unsecured creditors, as their interests may appear, and thereupon the court shall, by an order, turn over full possession and title of said property, free and clear of encumbrances to the debtor: Provided, That upon request in writing by any secured creditor or creditors, the court shall order the property upon which such secured creditors have a lien to be sold at public auction. The debtor shall have ninety days to redeem any property sold at such sale, by paying the amount for which any such property was sold, together with 5 per centum per annum interest, into court, and he may apply for his discharge, as provided for by this Act. If, however, the debtor at any time fails to comply with the provisions of this section, or with any orders of the court made pursuant to this section, or is unable to refinance himself within three years, the court may order the appointment of a trustee, and order the property sold or otherwise disposed of as provided for in this Act.

"(4) The conciliation commissioner, appointed under subsection (a) of section 75 of this Act, as amended, shall continue to act, and act as referee, when the farmer debtor amends his petition or answer, asking to be adjudged a bankrupt under the provisions of subsection (s) of section 75 of this Act, and continue so to act until the case has been finally disposed of. The conciliation commissioner, as such referee, shall receive such an additional fee for his services as may be allowed by the court, not to exceed $35 in any case, to be paid out of the bankrupt's estate. No additional fees or costs of administration or supervision of any kind shall be charged to the farmer debtor when or after he amends his petition or answer, asking to be adjudged a bankrupt, under subsection (s) of section 75 of this Act, but all such additional filing fees or costs of administration or supervision shall be charged against the bankrupt's estate. Conciliation commissioners and referees appointed under section 75 of this Act shall be entitled to transmit in the mails, free of postage, under cover of a penalty envelope, all matters which relate exclusively to the business of the courts, including notices to creditors. If, at the time that the farmer debtor amends his petition or answer, asking to be adjudged a bankrupt, a receiver is in charge of any of his property, such receiver shall be divested of possession, and the property returned to the possession of such farmer, under the provisions of this Act. The provisions of this Act shall be held to apply also to partnerships, common, entirety, joint, community ownerships, or to farming corporations where at least 75 per centum of the stock is owned by actual farmers, and any such parties may join in one petition.

"(5) This Act shall be held to apply to all existing cases now pending in any Federal court, under this Act, as well as to future cases; and all cases that have been dismissed by any conciliation commissioner, referee, or court because of the Supreme Court decision holding

the former subsection (s) unconstitutional, shall be promptly reinstated, without any additional filing fees or charges. Any farm debtor who has filed under the General Bankruptcy Act may take advantage of this section upon written request to the court; and a previous discharge of the debtor under any other section of this Act shall not be grounds for denying him the benefits of this section.

"(6) This Act is hereby declared to be an emergency measure and if in the judgment of the court such emergency ceases to exist in its locality, then the court, in its discretion, may shorten the stay of proceedings herein provided for and proceed to liquidate the estate.

Approved, August 28, 1935.

(8625-C)

APPENDIX B.

Sec. 5167—Code of Virginia.

How such deed of trust construed and effect of certain words, therein; duties, rights, and obligations of the parties and beneficiaries; duties of clerks upon recordation:—

Every deed of trust to secure debts or indemnify sureties, except so far as may be therein otherwise provided, shall be construed to impose and confer upon the parties thereto, and the beneficiaries thereunder, the following duties, rights and obligations in like manner as if the same were expressly provided for by such deed of trust, namely:

(1) The deed shall be construed as given to secure the performance of each of the covenants entered into by the grantor as well as the payment of the primary obligation.

(2) The grantor shall be deemed to covenant that he will pay all taxes, levies, assessments and charges upon the property, including the fees and charges of such agents or attorneys as the trustee may deem advisable to employ at any time for the purposes of the trust, so long as any obligation upon the grantor under the deed of trust remains undischarged.

(3) The grantor shall be deemed to covenant that he will keep the improvements on the property in tenantable condition, whether such improvements were on the property when the deed of trust was given or were thereafter placed thereon.

(4) The grantor shall be deemed to covenant that no waste shall be committed or suffered upon the property.

(5) The grantor shall be deemed to covenant that in the event of his failure to meet any obligations imposed upon him then the trustee or any beneficiary may, at his option, satisfy the same; and the money so advanced with interest thereon shall be a part of the debt secured by the deed, in the event of sale to be paid next after the expenses of executing the trust, and shall be otherwise recoverable from the grantor as a debt.

(6) In the event of default in the payment of the debt secured, or any part thereof, at maturity, or in the payment of interest when due, or of the breach of any of the covenants entered into or imposed upon the grantor, then at the request of any beneficiary the trustee shall forthwith declare all the debts and obligations secured by the deed of trust at once due and payable, shall take possession of the property and proceed to sell the same at auction at the premises (or at such other place as the trustee may select) upon such terms and conditions as the trustee may deem best, after first advertising the time, place and terms of sale in such manner as the deed may provide, or, if as the trustee may elect, no notice to the grantor or his successor in title being required.

(7) If the property is located in a city, or in a county in which a city or part thereof is located, publication of the advertisement five times in a newspaper published in such city (the last insertion if desired on the day of sale) shall be deemed adequate; if not being intended, however, to declare that other and different advertisement may not in any case be deemed reasonable, nor to

prevent the trustee from giving the sale such additional advertisement as he may deem advisable.

(8) If the deed of trust itself provides a method of advertising, which may be done by using the words "advertisement required", or words of like purport, followed by the method agreed on, then no other or different advertisement shall be necessary, beyond what the deed calls for, though the trustee may, in his discretion, give further advertisement.

(9) The trustee may postpone the sale at his discretion, in such case giving such notice or advertisement of such postponement as he may deem reasonable. Without meaning to declare any other method unreasonable, when the advertisement is by publication in a newspaper the continuation thereof in the subsequent issues of such newspaper with a note of such adjournment appended shall be deemed adequate in the absence of contrary provision in the deed of trust.

(10) The trustee may require of any bidder at any sale a cash deposit of not exceeding one hundred dollars, (unless the deed of trust specifies a different maximum, which may be done by the words, "bidder's deposit of not more than . . . dollars may be required", or words of like purport), before his bid is received, which shall be refunded to the bidder unless the property is sold to him, otherwise to be applied to his credit in settlement, or should he fail to complete his purchase promptly to be applied to pay to the costs and expenses of sale and the balance, if any, to be retained by the trustee as his compensation in connection with that sale.

(11) If the sale be upon credit terms the deferred purchase money shall bear interest from the day of sale

and shall be secured by a deed of trust upon the property contemporaneous with the trustee's deed to the purchaser. The clerk of the court upon admitting to record the deed of such trustee conveying property held in trust shall note a reference to same on the margin of the deed book where the deed or other writing conveying the property to such trustee in trust is recorded, if the same can be found in his office.

(12) The trustee shall receive and receipt for the proceeds of sale, no purchaser being required to see to the application of the proceeds, and apply the same, first, to discharge the expenses of executing the trust, including a commission to the trustee of five per centum of the gross proceeds of sale; secondly, to discharge all taxes, levies, and assessments, with costs and interest, including the due *pro rata* thereof for the current year; thirdly, to discharge in the order of their priority, if any, the remaining debts and obligations secured by the deed, with lawful interest; and, fourthly, the residue of the proceeds shall be paid to the grantor or his assigns; provided, however, that the trustee as to such residue shall not be bound by any inheritance, devise, conveyance, assignment or lien of or upon the grantor's equity, without actual notice thereof prior to distribution.

(13) Upon discharge of all the debts, duties and obligations imposed by the deed upon the grantor, including any expenses incurred preparatory to sale, then upon the grantor's request the trustee shall execute and deliver a good and sufficient deed or release at the grantor's own proper costs and charges.

The following provisions may be incorporated in any such deed of trust in the respective short forms indicated, namely:

(a) The words "identified by trustee's signature", or words of like purport, shall be construed as if the deed set forth: "all of which said notes (or other obligations) bear the marginal signature of the trustee for the purpose of identification but for no other purpose whatever".

(b) The words "deferred purchase money", or words of like purport, shall be construed as if the deed set forth: "This deed of trust is a contemporaneous purchase money deed of trust and secures the payment of deferred purchase money due by the grantor upon the property hereby conveyed".

(c) The words "exemptions waived", or words of like purport, shall be construed as if the deed set forth: "The grantor hereby waives the benefit of his exemptions as to the debt hereby secured and as to all other obligations which may be imposed upon by the provisions of this deed of trust".

(d) The words "subject to call upon default", or words of like purport, shall be construed as if the deed set forth: "Should default be made in the payment of any payment of any part of the debt hereby secured, principal or interest, at the maturity of such part, or in the event of the breach of any of the covenants entered into or imposed upon the grantor, then the entire obligation of this deed of trust and the whole debt hereby secured shall, at the option of the beneficiaries, become forthwith due and payable."

(e) The words "renewal or extension permitted", or words of like purport, shall be construed as if the deed set forth: "The grantor hereby consents and agrees that the debt hereby secured, or any part thereof,

may be renewed or extended beyond maturity as often as may be desired by agreement between the creditor and any subsquent owner of the property, and no such renewal or extension shall in any way affect the grantor's responsibility, whether as surety or otherwise."

(f) The words 'right of anticipation reserved," or words of like purport, shall be construed as if the deed set forth: "The grantor reserves the right to anticipate the payment of the debt hereby secured, or any part thereof which is represented by a separate note, (or other obligation) at any interest period by the payment of principal and interest to the date of such anticipated payment only".

(g) The words "priority in direct order of maturity", or words of like purport, shall be construed as if the deed set forth: "The notes (or other obligations) hereby secured have priority amongst themselves in the direct order of their maturities, each having priority over all others falling due after its maturity." And the words, "priority in inverse order of maturity", or words of like purport, shall be construed as if the deed set forth: "The notes (or other obligations) hereby secured have priority amongst themselves in the inverse order of their maturities, each having priority over all others falling due before its maturity".

(h) The words "insurance required . . . dollars", or words of similar purport, shall be construed as if the deed set forth: "The grantor covenants that he will keep the improvements on the property insured against fire in some solvent insurance company approved by the trustee for the benefit of the beneficiaries hereunder in the sum of at least / . . dollars, and will deposit with the trustee the policies, with standard loss payable clausod (clause) with full contribution in favor of the

trustee as his interest may appear; and the grantor further covenants that in the event of his failure to keep the property so insured and the policies so deposited, then the trustee or any beneficiary may, at his option, effect such insurance and pay the premiums thereon, and the money so paid, with interest thereon, shall become a part of the debt hereby secured, in the event of sale to be paid next after the expenses of executing this trust, and shall be otherwise recoverable from the grantor as a debt; but there shall be no obligation upon the trustee or beneficary to effect such insurance."

SUPREME COURT OF THE UNITED STATES.

No. 530.—October Term, 1936.

Robert Page Wright, Bankrupt, Petitioner, *vs.* Vinton Branch of the Mountain Trust Bank of Roanoke, Virginia, et al.	On Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

[March 29, 1937.]

Mr. Justice Brandeis delivered the opinion of the Court.

The question for decision is whether Section 75, subsection (s), of the Bankruptcy Act, as amended by the new Frazier-Lemke Act, August 28, 1935, c. 792, 49 Stat. 943-945, is constitutional. In this case, the federal court for western Virginia (see *In re Sherman*, 12 Fed. Supp. 297) and the Circuit Court of Appeals for the Fourth Circuit (85 F. (2d) 973) held it invalid. Like decisions have been rendered in other circuits. *Lafayette Life Insurance Co.* v. *Lowmon*, 79 F. (2d) 887 (Seventh Circuit); *United States National Bank of Omaha* v. *Pamp*, 83 F. (2d) 493 (Eighth Circuit). In the Fifth Circuit the legislation was sustained. *Dallas Joint Stock Land Bank* v. *Davis*, 83 F. (2d) 322. Because of this conflict and the importance of the question, we granted certiorari. (299 U. S. —.)[1]

Wright, a Virginia farmer, gave in 1929 a mortgage deed of trust of his farm to secure a debt now held by the Vinton Branch of the

[1] See also Steverson *v.* Clark, 86 F. (2d) 330, and Knotts *v.* First Carolinas Joint Stock Land Bank, *id.*, 551 (Fourth Circuit), applying the decision in the instant case; McWilliams *v.* Blackard, *id.*, 328, and Phoenix Joint Stock Land Bank *v.* Ledwidge, *id.*, 355 (Eighth Circuit), applying the decision in United States National Bank of Omaha *v.* Pamp, *supra;* and Schauer *v.* Producers Wool & Mohair Co., *id.*, 576 (Fifth Circuit), applying the decision in Dallas Joint Stock Land Bank *v.* Davis, *supra.* The cases in the district courts are also conflicting. The legislation was sustained in In re Slaughter, 12 Fed. Supp. 206 (N. D. Tex.); In re Reichert, 13 *id.*, 1 (W. D. Ky.); In re Cole, *id.*, 283 (S. D. Ohio); In re Bennett, *id.*, 353 (W. D. Mo.); and In re Chilton, 16 *id.* 14 (D. Colo.). Compare In re Paul, 13 *id.* 645 (S. D. Iowa); In re Slaughter, *id.*, 893 (N. D. Tex.). It was held invalid in In re Young, 12 Fed. Supp. 30 (S. D. Ill.); In re Lindsay, *id.*, 625 (N. D. Iowa); In re Weise, *id.*, 871 (W. D. N. Y.); In re Davis, 13 *id.* 221 (E. D. N. Y.); In re Diller, *id.*, 249 (S. D. Cal.); In re Tschoepe, *id.*, 371 (S. D. Tex.); In re Schoenleber, *id.*, 375 (D. Neb.); In re Wogstad, 14 *id.* 72 (D. Wyo.); and In re Maynard, 15 *id.* 809 (D. Idaho). Compare In re Shonkwiler, 17 Fed. Supp. 697, 699 (E. D. Ill.).

Mountain Trust Bank. In March, 1935, he filed a petition under Section 75 of the Bankruptcy Act as amended June 28, 1934, c. 869, 48 Stat. 1289. When the proceedings were begun, the debt secured by the deed of trust had matured and was in default, and the trustee, at the request of the beneficiary, had advertised the property for sale pursuant to the terms of the deed of trust and the provisions of the Virginia Code. The debtor's petition prayed, among other things, "that all proceedings against him by way of pending and advertised foreclosures of his farming lands, or by other methods contrary to the provisions" of the Act be stayed. The petition, "appearing to be in proper form and to have been filed in good faith", was referred to the Conciliation Commissioner as required by Section 75. On July 27, 1935, the debtor made a proposal for composition; but it was not accepted by the mortgage creditor. On October 8, 1935, Wright filed an amended petition under subsection (s) of Section 75 as amended by the new Frazier-Lemke Act; and asked to be adjudged a bankrupt and to have all the benefits of the provisions of said sub-section (s) as so amended and approved August 28, 1935.

An order was entered adjudging Wright a bankrupt and again referring the matter to the Conciliation Commissioner. Thereafter, the Vinton Branch of the Mountain Trust Bank moved in the District Court that the proceedings before the Commissioner be terminated and "that this case be dismissed upon the ground that Subsection (s) of said Act is unconstitutional in that it deprives said creditor of its property without due process of law and that the debtor is not entitled to pursue the remedies and privileges granted therein." On January 8, 1936, that motion was granted; all proceedings on the bankrupt's petition were terminated; and his petition was dismissed. It is that order, affirmed by the Court of Appeals, which is here for review. Both of the lower courts held that, since the applicable rights of a mortgagee in Kentucky and of the beneficiary under a mortgage deed of trust in Virginia are substantially the same, our decision in *Louisville Joint Stock Land Bank* v. *Radford*, 295 U. S. 555, required that sub-section (s) be held unconstitutional.

First. The mortgagee claims that the legislation is void on its face. It challenges the power of Congress to confer upon courts authority to grant to a mortgagor, under any circumstances, any of the relief provided for in sub-section (s) of the new Frazier-Lemke Act. There has been no order granting a stay under Paragraph 2 of sub-section

(s). But the suit is not premature; for the fact that no stay order has been entered does not imply that an actual constitutional controversy is not presented. The petitioner asserts a right to pursue proceedings provided by a federal statute, and that right has been denied him on grounds of the alleged invalidity of the statute. Before the motion to dismiss was made, the district court had entered its order adjudging petitioner a bankrupt, and referring the matter to the conciliation commissioner for further proceedings under Section 75 (s). The entry of the order of reference initiated proceedings designed to move, through the appointment of appraisers, the appraisal, and the referee's order recognizing the debtor's right to possession, to the grant of the stay by the court. Under the Act no further affirmative action by petitioner precedent to his obtaining the stay was necessary. The mortgagee was not obliged to delay his challenge to the validity of the stay and its essential incidents until these officials had complied with the mandatory provisions of the Act. But while we must decide whether the challenged sub-section is constitutional, we refrain from deciding questions suggested which may arise later in the course of its administration.

Second. The decision in the *Radford* case did not question the power of Congress to offer to distressed farmers the aid of a means of rehabilitation under the bankruptcy clause. The original Frazier-Lemke Act was there held invalid solely on the ground that the bankruptcy power of Congress, like its other great powers, is subject to the Fifth Amendment; and that, as applied to mortgages given before its enactment, the statute violated that Amendment, since it effected a substantial impairment of the mortgagee's security. The opinion enumerates five important substantive rights in specific property which had been taken. It was not held that the deprivation of any one of these rights would have rendered the Act invalid, but that the effect of the statute in its entirety was to deprive the mortgagee of his property without due process of law. The rights enumerated were (pp. 594-595):

"1. The right to retain the lien until the indebtedness thereby secured is paid.

"2. The right to realize upon the security by a judicial public sale.

"3. The right to determine when such sale shall be held, subject only to the discretion of the court.

"4. The right to protect its interest in the property by bidding at such sale whenever held, and thus to assure having the mort-

gaged property devoted primarily to the satisfaction of the debt, either through receipt of the proceeds of a fair competitive sale or by taking the property itself.

"5. The right to control meanwhile the property during the period of default, subject only to the discretion of the court, and to have the rents and profits collected by a receiver for the satisfaction of the debt."

In drafting the new Frazier-Lemke Act, its framers sought to preserve to the mortgagee all of these rights so far as essential to the enjoyment of his security. The measure received careful consideration before the committees of the House and the Senate. Amendments were made there with a view to ensuring the constitutionality of the legislation recommended. The Congress concluded, after full discussion, that the bill, as enacted, was free from the objectionable features which had been held fatal to the original Act.

Third. It is not denied that the new Act adequately preserves three of the five above enumerated rights of a mortgagee. "The right to retain the lien until the indebtedness thereby secured is paid" is specifically covered by the provisions in Paragraph 1, that the debtor's possession, "under the supervision and control of the court", shall be "subject to all existing mortgages, liens, pledges, or encumbrances", and that:

"All such existing mortgages, liens, pledges, or encumbrances shall remain in full force and effect, and the property covered by such mortgages, liens, pledges, or encumbrances shall be subject to the payment of the claims of the secured creditors, as their interests may appear."[2]

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[2] Amendments to the bill subsequent to its introduction plainly demonstrate careful intention to leave the lien wholly unimpaired. As introduced, the measure provided for retention of the lien 'up to the actual value of such property, as fixed by the appraisals provided for in this section,' S. 3002, Sec. 6, p. 6 (Compare Act of June 28, 1934, c. 869, Subsec. (s), (2), 48 Stat. 1290); and there was no provision for a public sale at the request of the secured creditor. As reported out of the Senate Committee on the Judiciary, and as subsequently enacted, the measure provided for retention of the lien unqualified by reference to the appraisal value of the property. See S. 3002, as reported, Sec. 6, p. 6; Sen. Rep. No. 985, 74th Cong., 1st Sess., p. 3. As reported by the committee, the bill provided for a public sale in the discretion of the court, upon request of the secured creditor, and limited the lienholder's bid at such sale to 'the appraised value or the original principal, whichever is the higher.' S. 3002, *supra*, Sec. 6, p. 9; Sen. Rep. No. 985, *supra*, pp. 4, 6. Since the latter qualification was thought to raise some constitutional doubt, it was eliminated during the Senate's consideration of the measure. See statements of Senators Ashurst and Borah, of the Committee on the Judiciary, and of Senator Frazier, 79 Cong. Rec. 13413, 13633, 13634, 13641. The House Committee on the Judiciary reported the bill with this change. H. R. Rep. No. 1808, 74th Cong., 1st Sess., pp. 1, 4, 6.

"The right to realize upon the security by a judicial public sale" is covered by the provision in Paragraph 3 that at the termination of the stay:

" . . . upon request in writing by any secured creditor or creditors, the court shall order the property upon which such secured creditors have a lien to be sold at public auction."[3]

The new Act does not in terms provide for "The right to protect its [the mortgagee's] interest in the property by bidding at such sale whenever held . . ." But the committee reports and the explanations given in Congress make it plain that the mortgagee was intended to have this right.[4] We accept this view of the statute.

Fourth. The claim that sub-section (s) is unconstitutional rests mainly upon the contention that the Act denies to a mortgagee the "right to determine when such sale shall be held, subject only to the discretion of the court." The assertion is that the new Act in effect gives to the mortgagor the absolute right to a three-year stay;

[3] As introduced, S. 3002 contained the provision of the Act by which the mortgagor might purchase at the appraised value, subject to the mortgagee's right to require a re-appraisal; but it did not provide that the mortgagee might, in lieu of a re-appraisal, have a public sale. The bill as reported by the Senate Committee on the Judiciary inserted after the provision for appraisal a clause providing, "That upon request in writing by any secured creditor or creditors, the court, in its discretion, if it deems it for the best interests of the secured creditors and debtor, may order the property upon which such secured creditors have a lien, to be sold at public auction; . . ." S. 3002, as reported, sec. 6, p. 9; see Sen. Rep. No. 985, 74th Cong., 1st Sess., p. 4. "To remove a question as to the constitutionality of the bill", this provision was altered in the course of the bill's passage through the House to deprive the court of discretion in the matter and to give the secured creditor an unqualified right to a public sale as the alternative to a transfer of the property to the debtor at the re-appraised value. See remarks of Representative Sumners, of the House Committee on the Judiciary, 79 Cong. Rec. 14332-33.

[4] As reported by the Senate Committee on the Judiciary, S. 3002, sec. 6, p. 9, recognized a right in the mortgagee to bid at the sale not in excess "of the appraised value or the original principal, whichever is the higher." See Sen. Rep. No. 985, 74th Cong., 1st Sess., pp. 4, 6. In striking out this qualification for the express purpose of avoiding a constitutional doubt, Senators responsible for the measure plainly showed that they had no intention of raising a further constitufional controversy by questioning the mortgagee's unqualified right to bid. See statements of Senators Ashurst, Borah, and Frazier, 79 Cong. Rec. 13413, 13633, 13634, 13641-42. H. R. Rep. No. 1808, 74th Cong., 1st Sess., pp. 1, 5-6, unequivocally declared that under the Act the secured creditors have the right to bid at the sale; and this was made clear on the floor of the House by Representative Sumners, of the Committee on the Judiciary. See 79 Cong. Rec. 14333.

The beneficiary under a mortgage deed of trust in Virginia is permitted to bid in the property at the sale. See, *e. g.*, Ashworth *v.* Tramwell, 102 Va. 852, 858, 47 S. E. 1011; Title Insurance Co. of Richmond, Inc. *v.* Industrial Bank of Richmond, Inc., 156 Va. 322, 327, 157 S. E. 710; Everette *v.* Woodward, 162 Va. 419, 174 S. E. 864. Compare Easton *v.* German-American Bank, 127 U. S. 532, 538.

and that a three-year moratorium cannot be justified. The three-year stay is specified in the following provisions:

"When the conditions set forth in this section [Section 75] have been complied with, the court shall stay all judicial or official proceedings in any court, or under the direction of any official, against the debtor or any of his property, for a period of three years." (Par. 2.)

"At the end of three years, or prior thereto, the debtor may pay into court the amount of the appraisal of the property of which he retains possession, including the amount of encumbrances on his exemptions, up to the amount of the appraisal, less the amount paid on principal." (Par. 3.)[5]

Whether, in view of the emergency, an absolute stay of three years would have been justified under the bankruptcy power, we have no occasion to decide. There are other provisions in the statute affecting the mortgagor's right to possession. Their phraseology is lacking in clarity. But we are of opinion that, while the Act affords the debtor, ordinarily, a three-year period of rehabilitation, the stay provided for is not an absolute one; and that the court may terminate the stay and order a sale earlier. If we were in doubt as to the intention of Congress, we should still be led to that construction by a well settled rule: "When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Crowell* v. *Benson*, 285 U. S. 22, 62.

The mortgagor's right to retain possession during the stay is specifically limited by paragraph 3, which provides:

"If, however, the debtor at any time fails to comply with the provisions of this section, or with any orders of the court made pursuant to this section, or is unable to refinance himself within three years, the court may order the appointment of a trustee, and order the property sold or otherwise disposed of as provided for in this Act."

Thus, for example, the debtor's tenure under the stay is subject to the requirement that he pay "a reasonable rental semiannually

[5] This clause is qualified by alternative provisos, one for payment at a reappraised value, the other for a public sale to be held upon the mortgagee's request at the time when the stay expires, whether by lapse of time or by the mortgagor's payment into court of the appraised or reappraised value. See Note 3, *supra*.

for that part of the property of which he retains possession." Under the last-quoted provision of Paragraph 3, if the debtor defaults in this obligation "at any time", the court may thereupon order the property sold. Likewise, the property while in the debtor's possession is kept, according to Paragraph 2, at all times "in the custody and under the supervision and control of the court"; and, also under Paragraph 2:

"The court, in its discretion, if it deems it necessary to protect the creditors from loss by the estate, and/or to conserve the security, . . . may, in addition to the rental, require payments on the principal due and owing by the debtor to the secured or unsecured creditors, as their interests may appear, in accordance with the provisions of this Act, and may require such payments to be made quarterly, semiannually, or annually, not inconsistent with the protection of the rights of the creditors and the debtor's ability to pay, with a view to his financial rehabilitation."

Paragraph 3 authorizes the court to have the property sold if "at any time" the debtor should fail to comply with orders of the court issued under its power to require interim payments on principal, or otherwise in the course of its "supervision and control" of his possession. Paragraph 3 also provides that "if . . . the debtor at any time . . . is unable to refinance himself within three years", the court may close the proceedings by selling the property. This clause must be interpreted as meaning that the court may terminate the stay if after a reasonable time it becomes evident that there is no reasonable hope that the debtor can rehabilitate himself within the three-year period.[6]. Finally, the intention

[6] This construction is in harmony with the requirement of good faith in the initiation of proceedings under § 75. Relief under § 75 (s) may be obtained only by one who has made a bona fide attempt, and has failed, to effect a composition under § 75, (a)-(r). The offer of composition must be in good faith, [§ 75, (c), (i), 47 Stat. 1471, 1472], and if the debtor is beyond all reasonable hope of financial rehabilitation, and the proceedings under § 75 cannot be expected to have any effect beyond postponing inevitable liquidation, the proceedings will be halted at the outset. The practical administration of § 75 in the lower courts already affords ample evidence of the substantial protection afforded the creditor by this requirement of good faith in the initiation of proceedings under subsections (a)-(r). See In re Borgelt, 79 F. (2d) 929; Dallas Joint Stock Land Bank *v.* Davis, 83 *id.* 322, 323; Steverson *v.* Clark, 86 *id.* 330; Knotts *v.* First Carolinas Joint Stock Land Bank, *id.* 551; In re Reichert, 13 Fed. Supp. 1, 4, 5; In re Paul, *id.*, 645, 647; In re Buxton's Estate, 14 *id.* 616; In re Vater, *id.*, 631; In re Schaeffer, *id.*, 807; In re Duvall, *id.*, 799; In re Byrd, 15 *id.* 453; In re Wylie, 16 *id.* 193, 194; In re Price, *id.*, 836, 837. Compare In re Chilton, 16 Fed. Supp. 14, 17; In re Davis, *id.*, 960. It must be assumed that the situation of the present debtor was not beyond all reasonable hope of rehabilitation, else he could not have qualified to file his petition at the outset. Compare Tennessee Publishing Co. *v.* American National Bank, 299 U. S. 18, 22.

of Congress to make the stay terminable by the court within the three years is shown also by Paragraph 6, which declares the Act an emergency measure, and provides that:

"if in the judgment of the court such emergency ceases to exist in its locality, then the court, in its discretion, may shorten the stay of proceedings herein provided for and proceed to liquidate the estate."[7]

Since the language of the Act is not free from doubt in the particulars mentioned, we are justified in seeking enlightenment from reports of Congressional committees and explanations given on the floor of the Senate and House by those in charge of the measure.[8] When the legislative history of the bill is thus surveyed, it becomes clear that to construe the Act otherwise than as giving the courts broad power to curtail the stay for the protection of the mortgagee would be inconsistent not only with provisions of the Act, but with the committee reports and with the exposition of the bill made in both Houses by its authors and those in charge of the bill and accepted by the Congress without dissent.[9] We construe it as giving the courts such power.

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[7] This provision is not inconsistent with the constitutional requirement that laws established by Congress on the subject of bankruptcies shall be uniform throughout the United States. Art. 1, § 8, cl. 4. The problem dealt with may present significant variations in different parts of the country. By Paragraph 6 the Bankruptcy Act adjusts its operation to these variations, as under other provisions it has adjusted its operation to the differing laws of the several States affecting dower, exemptions, and other property rights. Compare Hanover National Bank *v.* Moyses, 186 U. S. 181, 189; Stellwagen *v.* Clum, 245 U. S. 605, 613. The authority granted by Paragraph 6 does not exceed limits of authority familiarly exercised by courts. See Standard Oil Co. of New Jersey *v.* United States, 221 U. S. 1, 69; compare Chastleton Corporation *v.* Sinclair, 264 U. S. 543.

[8] Where the meaning of legislation is doubtful or obscure, resort may be had in its interpretation to reports of Congressional committees which have considered the measure, (McLean *v.* United States, 226 U. S. 374, 380; Tagg Bros. & Moorhead *v.* United States, 280 U. S. 420, 435); to exposition of the bill on the floor of Congress by those in charge of or sponsoring the legislation, (Duplex Printing Press Co. *v.* Deering, 254 U. S. 443, 475; Richbourg Motor Co. *v.* United States, 281 U. S. 528, 536); to comparison of successive drafts or amendments of the measure, (United States *v.* Pfitsch, 256 U. S. 547, 551; United States *v.* Great Northern Railway Co., 287 U. S. 144, 155); and to the debates in general in order to show common agreement on purpose as distinguished from interpretation of particular phraseology, (Federal Trade Commission *v.* Raladam Co., 283 U. S. 643, 650; Humphrey's Executor v. United States, 295 U. S. 602, 625).

[9] Emphasis upon the deliberate intention to meet the constitutional objections raised in Louisville Joint Stock Land Bank *v.* Radford, 295 U. S. 555, dominated the consideration of the bill in all stages. See, *e. g.*, Sen. Rep. No. 985, 74th Cong., 1st Sess., pp. 1, 3; H. R. Rep. No. 1808, *id.*, pp. 1, 3; statements of Senator McGarran, 79 Cong. Rec. 11971; Senator Ashurst, *ibid.*; Senator Borah, *id.*, 13411, 13632, 13642; Representative Lemke, *id.*, 14331, 14332; and Representative Sumners, *id.*, 14333. There was no dissent on constitutional grounds apart from the doubts which were disposed of as

Fifth. It is urged that subsection (s) is unconstitutional because there is taken from the mortgagee "the right to control meanwhile the property during the period of default, subject only to the discretion of the court, and to have the rents and profits collected by a receiver for the satisfaction of the debt."

(a) The argument is that possession by the mortgagor during the stay is necessarily less favorable to the mortgagee than possession by a receiver or trustee would be. This is not true. The mortgagor is in default, but it is not therefore to be assumed that he is a wrongdoer, or incompetent to conduct farming operations. The legislation is designed to aid victims of the general economic depression. The mortgagor is familiar with the property, and presumably vitally interested in preserving ownership thereof and ready to exert himself to the uttermost to that end. It is not unreasonable to assume that, under these circumstances, the interests of all concerned

described in notes 2, 3, and 4, *supra*. Comparing the present measure with the former § 75 (s), Sen. Rep. No. 985, 74th Cong., 1st Sess., p. 5, pointed out that "the amended subsection (s) shortens the time of the stay of proceedings from 5 to 3 years, and . . . gives the court power to shorten that stay. It gives the court complete jurisdiction and custody of the property, with authority to fix the rental annually, and to sell perishable property and personal property that is not necessary for the debtor's farming operations. It will also be noticed that the court can require payments over and above the rental value. In other words, in the amended subsection (s), the property is virtually in the complete custody and control of the court, for all purposes of liquidation. . . ." Likewise, it was said in H. R. Rep. No. 1808, 74th Cong., 1st Sess., p. 5, that "The new subsection (s) shortens the time of the stay of proceedings from 5 to 3 years, and in addition gives the court power to shorten that period. . . . Under the new subsection (s) the property of the bankrupt is in the complete custody and control of the court, for all the purposes of liquidation." And at p. 6: "The Supreme Court intimated that in the original subsection, the district court did not have sufficient discretion. In this subsection, the district court is given complete control and discretion."

Discussion of the bill in the Senate is reported in 79 Cong. Rec. 11970-71, 13348-49, 13411-13, 13632-45.

In the Senate discussion there occurred the following (79 Cong. Rec. 13633):

"Mr. BORAH. The court is given power in the bill to make sale of the property whenever the court deems it in the interest of all parties to do so.

"Mr. HASTINGS. During the 3 years?

"Mr. BORAH. Yes. In the case of perishable property, or property which is not bringing in any income, or anything of that kind, the court has power to make sale of it.

" . . .

"Mr. FRAZIER. The bill gives the court authority to sell the property, if it deems it advisable, at any time. The court may sell any part of it or all of it at any time before or during or after the 3 years."

Discussion of the bill in the House is reported in 79 Cong. Rec. 13831, 14331-34. Presenting the bill, as reported from committee, Representative Lloyd explained: "We have in no way reduced the security of the mortgagee. We have left his security intact, but we have made it possible for the bank-

will be better served by leaving him in possession than by installing a disinterested receiver or trustee. For the mortgagor holds possession charged with obligations imposed for the benefit of the mortgagee as fully as if the property were in the possession of a receiver or trustee, and there is probably a saving of expense. In order to protect the creditor's interests, the possession is at all times subject to the supervision and control of the court; and, if the debtor, "at any time", fails to compiy with orders of the court issued in the exercise of its supervisory power to protect the mortgagee against waste or other abuse of his possession by the mortgagor, the court may order the property sold. The farmer's proceeding in bankruptcy for rehabilitation, resembles that of a corporation for reorganization. As to the latter it is expressly provided that the debtor may, to some extent, be left in possession, U. S. Code, Title 11, § 207 (c); and it is common practice to appoint as receivers one of the officials of the corporation.

(b) It is complained that the mortgagor is not required to pay the first instalment of rent until the end of one year. The phraseology of the applicable provision is not clear. Paragraph 2 provides:

"During such three years the debtor shall be permitted to retain possession of all or any part of his property, in the custody and under the supervision and control of the court, provided he pays a reasonable rental semiannually for that part of the property of which he retains possession. The first payment of such rental shall be made within one year of the date of the order staying proceedings, the amount and kind of such rental to be the usual customary rental in the community where the property is located, based upon the rental value, net income, and earning capacity of the property."

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ruptcy court to retain jurisdiction for a period not to exceed 3 years." 79 Cong. Rec. 13831.

There also occurred in the House the following (79 Cong. Rec. 14332):

"Mr. FORD of California. Is it not designed to give to the farmer a breathing spell so that he may orient himself in such a way as to get out of his present difficulties without in the least jeopardizing the lien of his creditors?

"Mr. LEMKE. Absolutely, and the district judge has complete control all the time of the farmer's property.

". . .

"Mr. ANDRESEN. All it does is to give a 3-year extension for the time of the redemption if the court so directs.

"Mr. LEMKE. Under the supervision and control of the court."

Despite some apparent similarity of language, the remarks quoted from the discussion in the Senate do not seem to have been addressed to the second proviso of paragraph 3 as it then stood, but to have been intended more generally, expressing the plan embodied in the last sentence of paragraph 3. See S. 3002, as reported from committee, sec. 6, p. 9.

The clause providing that "the first payment of such rental shall be made within one year" is obviously capable of either of two constructions. One, that the mortgagor may not be required by the court to pay before the close of the year. The other, that the court may not postpone the payment beyond one year. In view of the requirement of semi-annual rental, the latter seems to us more reasonable. We intimate no opinion as to the validity of this provision under the first construction. As here construed, the clause cannot be deemed arbitrary or unreasonable.

(c) The disposition of the rental required to be made is said to involve denial of the mortgagee's rights. Paragraph 2 provides:

"Such rental shall be paid into court, to be used, first, for payment of taxes and upkeep of the property, and the remainder to be distributed among the secured and unsecured creditors, and applied on their claims, as their interests may appear."

It is suggested that payment of taxes and keeping the property in repair takes the income from the mortgagee, and that the mortgagor alone may be benefited thereby; that if the mortgagor exercises the option to purchase the property at its appraised value, he will secure the property free of tax liens which otherwise might have accrued against it. But it must be assumed that the mortgagor will not get the property for less than its actual value. The Act provides that upon the creditor's request the property must be reappraised, or sold at public auction; and the mortgagee may by bidding at such sale fully protect his interest. Non-payment of taxes may imperil the title. Payments for upkeep are essential to the preservation of the property. These payments prescribed by the Act are in accordance with the common practice in foreclosure proceedings where the property is in the hands of receivers.[10]

Sixth. In support of the contention that the legislation is unconstitutional, it is pointed out that the delay in the enforcement of the mortgage under Section 75 of the Bankruptcy Act as amended by sub-section (s) may exceed the term of three years; that months may be consumed in the effort to obtain a composition or extension of the debtor's obligations with the consent of the creditors; that when a petition is filed praying for the relief outlined in sub-section

[10] See Shepherd *v.* Pepper, 133 U. S. 626, 652; Thompson *v.* Phenix Insurance Co., 136 U. S. 287, 293; Cake *v.* Mohun, 164 U. S. 311, 316; 1 Clark, Law and Practice of Receivers (2d ed. 1929) § 670; High, Law of Receivers (4th ed. 1910) § 643; 1 Wiltsie, Mortgage Foreclosure (4th ed. 1927) § 616. Compare Atlantic Trust Co. *v.* Chapman, 208 U. S. 360, 371.

(s) a further period of months may be consumed in having the property appraised and putting the debtor in the position which he must occupy before the stay is granted; that "four months from the date that the referee approves the appraisal" is given within which "either party may file objections, exceptions, and take appeals" from the appraisal; and that upon a sale of the property under Paragraph 3:

"The debtor shall have ninety days to redeem any property sold at such sale, by paying the amount for which any such property was sold, together with 5 per centum per annum interest, into court . . ."

It is pointed out, also, that the mortgage here in question is in the form of a deed of trust.[11] It is claimed that the rights to enforce payment by sale of the mortgage property, conferred by the law of Virginia upon the creditor under such a deed, are more peremptory than those under the law of Kentucky discussed in the *Radford* case.[12] And it is urged that the limitations here placed upon the enforcement of the mortgage are not merely a modification of the remedy recognized as permissible. Compare *Home Building & Loan Association* v. *Blaisdell*, 290 U. S. 398, 434.

But the question here involved is not one of state action under the police power alleged to violate the contract clause. The power here exerted by Congress is the broad power "To establish . . . uniform Laws on the subject of Bankruptcies throughout the United States." The question which the objections raise is not whether the Act does more than modify remedial rights. It is whether the legislation modifies the secured creditor's rights, remedial or substantive, to such an extent as to deny the due process of law guaranteed by the Fifth Amendment. A court of bankruptcy may affect the interests of lien holders in many ways. To carry out the purposes of the Bankruptcy Act, it may direct that all liens upon property forming part of a bankrupt's estate be marshalled; or that the property be sold free of encumbrances and the rights

[11] See Franklin Plant Farm, Inc. *v.* Nash, 118 Va. 98, 111, 86 S. E. 836, 840; Dillard *v.* Serpell, 138 Va. 694, 697, 123 S. E. 343; 3 Jones, Law of Mortgages (8th ed. rev. 1928) §§ 1742, 2276.

[12] See Code of Va., 1918 (Michie 1924) § 5167, as amended, Acts, 1926, c. 324, subsecs. (1)-(6), (13); In re Sherman, 12 Fed. Supp. 297, 298-299; compare Hogan *v.* Duke, 20 Gratt. 244, 256, 259; Muller's Administrator *v.* Stone, 84 Va. 834, 837, 6 S. E. 223; Hudson *v.* Barham, 101 Va. 63, 67, 68, 43 S. E. 189. See also Ashworth *v.* Tramwell, 102 Va. 852, 858, 47 S. E. 1011; Peterson *v.* Haynes, 145 Va. 653, 661, 134 S. E. 675; Neff's Administrator *v.* Newman, 150 Va. 203, 210, 142 S. E. 389.

of all lien holders be transferred to the proceeds of the sale. *Van Huffel* v. *Harkelrode*, 284 U. S. 225, 227. Despite the peremptory terms of a pledge, it may enjoin sale of the collateral, if it finds that the sale would hinder or delay preparation or consummation of a plan of reorganization. *Continental Illinois National Bank & Trust Co.* v. *Chicago, Rock Island & Pacific Ry. Co.*, 294 U. S. 648, 680-681. It may enjoin like action by a mortgagee which would defeat the purpose of subsection (s) to effect rehabilitation of the farmer mortgagor. For the reasons stated, we are of opinion that the provisions of subsection (s) make no unreasonable modification of the mortgagee's rights; and hence are valid.

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.